No. 11114

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

STANDARD OIL COMPANY OF CALIFORNIA, a Corporation, and IRA BOONE,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division

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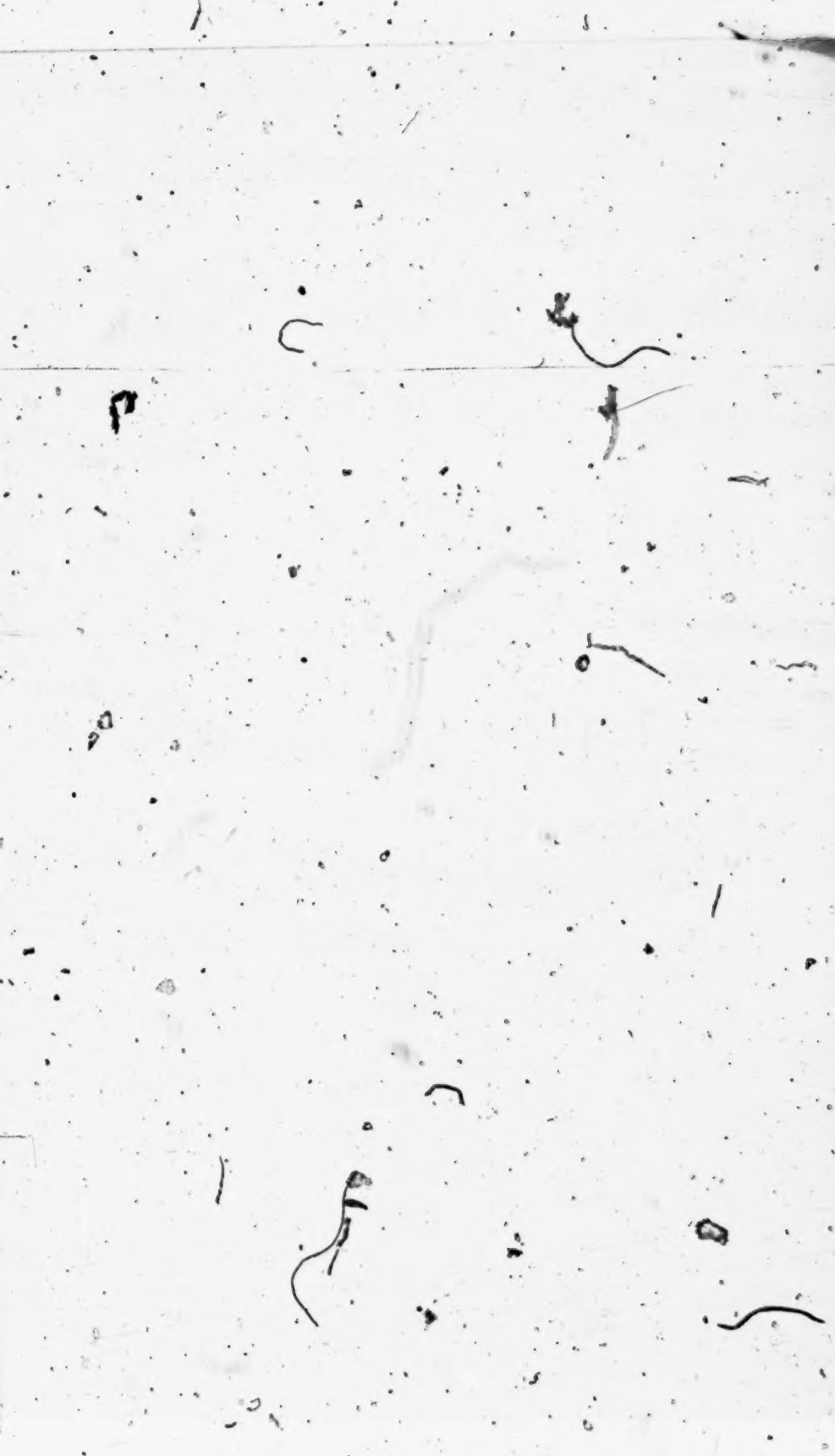

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

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*Page number appearing at foot of Certified Transcript.

In the District Court of the United States in and for the Southern District of California

Central Division

No. 4204-Y Civil

UNITED STATES OF AMERICA,

Plaintiff,

vs.

STANDARD OIL COMPANY of California, a corporation, and IRA BOONE,

Defendants

COMPLAINT

The United States of America by Charles H. Carr, United States Attorney for the Southern District of California, and Ronald Walker and Cameron L. Lillie, Assistant United States Attorneys for said district, alleges:

I.

That this action is brought in the above entitled court pursuant to the provisions of Title 28, Section 41(1) U. S. C. A. by reason of the fact that he United States of America is named herein as plaintiff.

II.

That during all of the times herein mentioned the defendant Standard Oil Company of California was, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of Delaware and said corporation has complied with the laws of the State of California so as to entitle it to do business in said state; that defendant Ira Boone is a resident of the County of Los Angeles, State of California. [2]

III.

That during all of the times herein mentioned John Etzel was an enlisted man in the armed forces of the United States government, and the servant of the plaintiff.

IV.

That at all times herein mentioned Figueroa Street and Eighth Street were, and now are, public and intersecting streets and highways in the City of Los Angeles, County of Los Angeles, State of California, and within the Southern District of California, Central Division.

V.

That at all times herein mentioned the defendant Standard Oil Company of California, a corporation, was the owner of a certain G.M.C. truck; that at all times herein Ira Boone was acting as the agent, servant and employee of the other defendant herein, and operating, driving and using the said G.M.C. truck in the course and scope of his employment.

VI.

That on or about the 7th day of February, 1944, John Etzel as a pedestrian was crossing Figueroa Street in an easterly direction at the intersection of said Figueroa and Eighth Streets; and that at said time and place John Etzel was at all times within the confines of a marked pedestrian zone; that at said time and place the defendant Ira Boone acting as aforesaid, was driving and operating said G.M.C. truck with the knowledge and consent of the other defendant in a southerly direction on Figueroa Street.

VII.

That at said time and place defendant Ira Boone so carelessly and negligently drove and operated said G.M.C. truck as to cause the same to run into and strike the person of John Etzel, knocking him violently to the pavement and as a direct and proximate result of the carelessness

and negligence of said defendants and each of them, John Etzel received the following permanent injuries; severe injuries to the head, face and left thigh; contusions, lacerations and abrasions of the entire body. [3]

VIII.

That at the time of said accident and prior thereto John Etzel, the servant of the plaintiff, was an able-bodied man and by reason of said accident and as a direct and proximate result of the carelessness and negligence of the defendants and each of them, and the resulting injuries to John Etzel, he became physically unable to pursue his work and duties or any work and duties during the period from February 7, 1944 to March 6, 1944, and as a result thereof the services of John Etzel were lost to the plaintiff for the aforesaid period, and also by reason thereof the plaintiff became liable to pay, and did pay John Etzel as compensation, salary and wage for the aforesaid period, the sum of $69.31; that by reason of the injuries sustained by John Etzel the plaintiff has expended for hospital care, the sum of $123.25, which sum is the fair and reasonable value of the necessary hospital care required by John Etzel as a result of the above mentioned injuries;

Wherefore, plaintiff prays judgment in the sum of $192.56 and for its costs of suit herein, and such other relief as may be deemed just in the premises.

CHARLES H. CARR
United States Attorney
RONALD WALKER
Assistant U. S. Attorney
CAMERON L. LILLIE
Assistant United States Attorney

[Endorsed]: Filed Jan. 23, 1945. [4]

[Title of District Court and Cause.]

ANSWER

Come now the defendants above named and answering plaintiff's complaint admit, deny, and allege as follows:

I.

Defendants here answering have no information or belief upon the subject of the allegations contained in Paragraph I thereof sufficient to enable them to make answer thereto, and basing their denial upon the ground of the want of such information and belief, deny generally and specifically each and every allegation therein contained.

II.

Answering Paragraph III these defendants deny that John Etzel was during any of the times mentioned in plaintiff's complaint the servant of plaintiff. Defendants here answering [5] have no information or belief upon the subject of the remaining allegations contained in said Paragraph III thereof sufficient to enable them to answer the same, and basing their denial upon the ground of the want of such information and belief, deny generally and specifically each and every allegation therein contained not herein specifically denied.

III.

Answering Paragraph V these defendants deny that the defendant Ira Boone was the agent of his co-defendant at the times or for the purposes therein alleged or at all.

IV.

Answering Paragrap' 'I these defendants deny that the said John Etzel w all times described n plaintiff's

complaint within the confines of a marked pedestrian zone; admit, however, that said John Etzel was immediately prior to the happening of a collision on February 7, 1944 immediately south of the intersection of Eighth and Figueroa Streets, Los Angeles, California.

V.

Deny generally and specifically each and every allegation contained in Paragraph VII of plaintiff's complaint.

VI.

Answering the allegations contained in Paragraph VIII, these defendants have no information or belief concerning certain allegations therein contained sufficient to enable them to answer the same, and basing their denial upon the ground of the want of such information and belief, deny that at the time alleged or at all John Etzel was an able-bodied man. Deny generally and specifically each and every allegation contained in Paragraph VIII not herein specifically denied for want of information and belief. Deny that plaintiff has been damaged in any sum or amount whatsoever. [6]

Second Defense

I.

The complaint fails to state a claim against the defendants, or either of them, upon which relief can be granted.

Third Defense

I.

On February 7, 1944 John Etzel so negligently and carelessly failed and neglected to exercise ordinary care for his own safety and so negligently and carelessly proceeded on Figueroa Street near its intersection with

Eighth Street in Los Angeles, California, that he came in collision with a motor vehicle; that any and all injury and damage claimed to have been sustained by plaintiff herein or John Etzel were directly and proximately caused and contributed to by the aforesaid negligence and carelessness of the said John Etzel.

Fourth Defense

I.

That on or about March 16, 1944, for a valuable consideration, John Etzel released and discharged defendants herein and each of them of and from any and all claims and demands on account of or arising out of an accident occurring to said John Etzel at said time and place. That said release has never been rescinded nor disavowed and is still in full force and effect and by reason thereof all claims asserted by plaintiff herein have been fully settled and discharged.

Wherefore, these answering defendants pray that plaintiff take nothing by its complaint herein and that these defendants recover their costs herein incurred.

JENNINGS & BELCHER

By Stevens Fargo

Attorneys for Defendants [7]

[Verified.]

[Endorsed]: Filed Mar. 13, 1945. [8]

[Title of District Court and Cause.]

STIPULATION OF FACT

It Is Stipulated by and between the plaintiff and the defendants herein that upon any trial of the above action the court may deem proved the following:

> "That plaintiff has expended for hospital care for John Etzel the sum of $123.25, which sum is the fair and reasonable value of hospital care necessarily required for John Etzel as a result of certain injuries suffered by John Etzel on or about February 7, 1944."

It is understood and agreed that by making the foregoing stipulation defendants do not stipulate, nor shall it be inferred [9] therefrom, that said plaintiff was required to make such expenditure nor that defendants or any of them were or are liable therefor, either to plaintiff or said John Etzel.

Dated: April 13, 1945.

CHARLES H. CARR
United States Attorney
and
RONALD WALKER and
CAMERON L. LILLIE
Assistant United States Attorneys
By Cameron L. Lillie
Attorneys for Plaintiff

JENNINGS & BELCHER
By Stevens Fargo
Attorneys for Defendants

[Endorsed]: Filed Apr. 24, 1945. [10]

[DEFENDANTS' EXHIBIT A]

RELEASE IN FULL

Received of Standard Oil Co. of Calif. & Ira Boone the sum of Three hundred and 00/100 Dollars (300.00/100)

In consideration of which sum I hereby release and discharge Standard Oil Co. of Calif. & Ira Boone of and from any and all claims and demands which I now have or may hereafter have, on account of or arising out of an accident which occurred on or about the 7th day of Feb., 1944, at 8th & Fig. Street Los Angeles, Calif.
(City or Town) (State)
resulting in injuries to me.

It is understood and agreed that this release extends to all claims of every nature and kind whatsoever, known or unknown, suspected or unsuspected, and all rights under Section 1542 of the Civil Code of California are hereby expressly waived.

It is further understood and agreed that the payment of said sum is not, and is not to be construed as, an admission on the part of said payors of any liability whatsoever in consequence of said accident.

Dated at Los Angeles, Calif., this 16 day of Mar. 1944.

John Etzel (L.S.)

This release should not be signed unless read by or read to the person signing same

T. I. Meredith, Jr.
Witness

Ruth E. Hammond
Witness

1122 Georgia St.
Address.

* * * * * * * * * *

"1542. Certain claims not affected by general release. A general release does not extend to claims which the credi-

tor does not know or suspect to exist in his favor at the time of executing the release which if known by him must have materially affected his settlement with the debtor." [11]

Case No. 4204. U. S. vs. Standard Oil et al. Deft. Exhibit A. Date 4/24/45. Exhibit A in Evidence. Clerk U. S. District Court, Sou. Dist. of Calif. Louis J. Somers, Deputy Clerk. [12]

[Title of District Court and Cause.]

OPINION [13]

Yankwich, District Judge:

At six-thirty A. M. on the 8th day of February, 1944, John Etzel, an enlisted man in the Armed Forces of the United States Government, was crossing Figueroa Street in the City of Los Angeles, on the south side of Eighth Street. Before stepping down from the curb to the pavement, he looked north and saw a semi-trailer oil truck, belonging to the defendant Standard Oil Company of California, and then driven by one of its employes, the co-defendant Ira Boone. The truck was at a distance of some seventy-five feet from the intersection. It was early in the morning and still dark. The automatic traffic signals were not operating. Etzel stepped into the street and crossed easterly, at all times remaining within the confines of the marked pedestrian zone.

Figueroa Street is fifty-six feet wide at that intersection. At a distance of about twenty-four feet from the curb, Etzel was hit by the truck. It is not clear what portion of the truck hit him. But from the fact that he had a large gash on the side of his head, the inference is justified that he came in contact with the right side of the truck, and that the head injury was caused by the handle of the door. He was thrown to the ground. In addition to the injury to his head, Etzel suffered injuries

to his face and left thigh and had contusions, lacerations and abrasions over his entire body. He was hospitalized and was unable to perform his tasks as a soldier for twenty-nine days.

By this action, the Government seeks to recover the sum of $192.56. Of this sum, $123.25 is the cost of Etzel's hospitalization. [14] As to this amount, there is a stipulation that it is the fair and reasonable value of the hospital care necessarily required for Etzel as a result of the injuries suffered. While the stipulation does not concede the necessity for the hospitalization, this fact flows from the obligation of the Government to care for persons in the military service, both under Congressional enactments and Army regulations. (1) The sum of $69.31 represents the wages paid to Etzel while he was incapacitated. There is no stipulation as to, or proof of, the reasonableness of the amount so paid. But, as the pay of enlisted men is fixed by Section 9 of the Pay Readjustment Act of June 16, 1942 (2) it must be assumed that the wages decreed by the Congress are reasonable.

And disability does not relieve the Government of the obligation to pay the wages prescribed.

We have to determine whether the Government is entitled to recover.

The defendants have challenged this right upon several grounds.

First, we must answer the question whether the Government of the United States has the right to sue for hospitalization and wages paid to a soldier during the time he was incapacitated through the tortious act of another. There are no precedents controlling. Strange as it may seem, the question has not arisen in peace time

or during any of the wars in which large numbers of men were in the active service of the Armed Forces of the United States. There are state court decisions dealing with the status of persons enlisted in the state militia. They do not help. They concerned attempts of persons injured while in the militia to recover under State Workmen's Compensation Acts. The rulings are both ways. Some cases deny the right to recover upon the ground that a person while an [15] active member of a state militia is not an employe. (3) Other cases decide the contrary. (4) Neither group is very persuasive on the question before us.

Workmen's compensation is based upon a theory which places responsibility for injuries upon industry regardless of fault. When applying this doctrine, the inclusion of any person within the beneficiary groups reflects largely the approach of the court to the problem and the range of its interpretation of a specific enactment. A narrow approach restricts the group, while a broad one, having in view the beneficial social aims to be achieved, enlarges it. (5) However, we are not without signposts to guide us in determining the question. And we can do so without adopting the strict theory of master and servant which the Government asserts. For, ultimately, we are confronted with the fact that courts now take a less circumscribed view of the relation than they did in the past. The trend is to hold that almost any association in which a person is subject to the control of another may be considered as a master-servant relation. Courts apply to it, especially when dealing with the harm which third persons may do to it, the rules of liability which would flow from a strict relation of master and servant. (6) At the common law, the master could recover for loss of services resulting from a tort committed

on the servant of a third person. (7) By analogy, a parent was given the right to recover for loss of the services of his child, (8) and a husband for those of his wife. (9) And these actions are entirely independent of the right of the servant, child, or wife to recover for the injuries themselves. (10) [16]

When a man becomes a soldier, a status is created whether the soldier enlisted voluntarily or is selected under a Selective Service law. (11) A voluntary enlistment originates in a contract for a definite period. But there any similarity between it and other contractual relationships, such as master and servant, ceases. The essence of the relation of master and servant is the freedom of the servant to end it, subject, of course, to responsibility for wrongful termination. But even a volunteer cannot withdraw from the army during the period of enlistment. Wrongful ending or even long, unexcused absence, is punishable as a crime both in peace and in war time. (12) The obligations which the Government assumes towards a soldier are more legislative than contractual. The Congress of the United States, in the exercise of its war powers, has either defined those obligations or allowed the army establishment to decree them pursuant to a defined congressional policy. In time of emergency, or war, the distinction between the volunteer and the draftee disappears. The aim of the Congress has been to apply all the rules ordained for the comparatively small army maintained in time of peace to the large citizen's army called up by the Selective Service and Training Act of 1940 and its later amendments. (13) So the upshot of the matter is this: A special relation has been created. Whether we call it a status, as some of the older cases do, or whether we just call it Government and soldier relation, it is clear that both the soldier and the Govern-

ment have certain rights and obligations arising from it and that a third party who, through his tortious act, interferes with it to the detriment of the Government, is responsible for the mischief he causes. And he cannot avoid responsibility [17] for his act by claiming that the relation is one for which the common law did not have a name. The relation is an actuality. And in the light of the modern trend to protect individuals and categories from outside tortious or even non-tortious interference, (14) the Government, which, through the negligent act of a third party, is put to the expense of hospitalizing a soldier and loses his services during a period for which it is compelled to pay him his wages, has a claim cognizable in this court.

An English case which arose during the last war sustains these views. The English Crown sought to recover for medical expenses, hospital treatment and wages of two air craftsmen of the Royal Air Force, who had been injured in a collision. The Crown's right to recover was sustained in these words:

> "As regards the claim in respect of wages, it is essentially a claim based upon the old common law principle that a master who has, by the tortious act of a third person, been deprived of the services of his servant may claim damages in respect of that deprivation against the third person who has brought it about. There is not, I think, any doubt that a right of action by a master for the loss of the services of his servant exists and has been recognized from early times. Curiously enough, it has perhaps been kept in activity most frequently as the fictitious basis, and the only basis, for the action of seduction by which the seducer of a woman or girl may be made to pay the penalty of his wrong-doing. [18] The

Solicitor General referred me to several cases based upon that principle, beginning with Hall v. Hollander, (4 B & C 660) in 1825; and perhaps most noticeably exemplified in Evans v. Walton. (L. R. 2 C. P. 615) It is well settled that when by the tort of a third party a master has lost the services of his servant he can recover damages in respect of that loss of service. The amount of his damages is, of course, dependent upon the facts of the particular case. If he has got a substitute to do the work of the servant, his damages may be the extra cost to which he has been put over and above the payment he makes to the servant who is incapacitated. If he has put an end temporarily to the contract of service of the injured servant and pays him nothing, his damages would be the amount, if any, that he has to pay to the substitute. The payment, if any, that he makes to the substitute may of course be equal to, more than or less than the wage of the injured servant. On the other hand, where he does not employ a substitute, if he continues to pay the wages to the injured servant, he clearly loses any benefit arising from that payment, because he is getting nothing in return for it. In that case, therefore, his damages are, prima facie, the amount of the wages that he has thus paid for nothing. This case is of that last mentioned class, and the damages claimed on behalf of [19] His Majesty are the amount of the wages paid to these men during their incapacity. There is no evidence to show that while these men were in fact being paid during their incapacity any extra men were recruited to take their place, or that any payment was made to any other person for doing their

work. Therefore, prima facie, damage has been suffered to the extent of the wages thus paid to them for nothing. So much for the claim in respect of wages.

"As regards medical expenses and hospital treatment, the claim for damages for these expenses is even more simple. It is put upon the ground that the Crown, having in fact expended the amount claimed under this head, ought to be compensated for these expenses by the person responsible for the negligence which rendered them necessary.

"That being the claim which His Majesty would prima facie be entitled to make, the suggested answer is that it is simply a claim by a master for damages for loss of his servant's services and incidental expenses, and that it must be treated and decided on the common law principles applicable to that relationship." (15) (Emphasis added)

It is apparent that the case was decided upon the assumption that the rules of master and servant apply. However, as already indicated, the conclusion must be the same, even if we take into account the dissimilarity between the Government and the soldier inter-relation and that [20] between master and servant. For, after making due allowance for the differences, we still have a cohesive pact which, like the pactum subjectionis,—the pact between king and subject in mediaeval Europe,—ties the soldier to the Government, at the same time reserving to each rights and obligations which flow from their union. Or we might apply to it the word which French jurists have coined to characterize certain solidarities which lie at the basis of social action,—institu-

tion. Such institution gives rise to droit institutionnel, a body of right arising from the communality of the group, such as the family, in which each member exercises certain rights and has obligations not as an individual, but as a member of the institution, according to the position he occupies,—suam cuique dignitatem. These rights or obligations stem not from the members as individuals, (in the case of the family, parents or children), but from the basic fact which brought it into being, (in the case of the family, marriage). (16)

So, if we bear in mind the wise saying of a French jurist that there is a greater logic than the logic of concepts,—the logic of life and of reality (17), the conclusion is inescapable that the foundational fact of enlistment, whether voluntary or forced, is the bond (vinculum) which brings into being the Government and soldier institution. To the institution so born, and to the Government and soldier, as members of it, certain rights attach. And the most fundamental one is that other shall not, by their wrongful action, interfere with it to the harm of the government.

Rightly. For the Government, after the institution comes into being, assumes a primacy and control over the actions of the other member, the soldier, which is greater than that of the master, husband, or father. Hence, whether we approach the problem with the common law norms in view or on the more latitudinarian basis of social actualities, [21] we are compelled to sustain the Government's right to institute this action. (18) Granted the right to sue, recovery is still dependent on proof of the negligence of the driver, and the absence of contributory negligence on the part of the soldier. It is

almost beyond dispute that the driver of the truck was negligent. He testified to seeing Etzel inside the cross walk. He failed to yield to him the right of way, in violation of the California Vehicle Code. (19) This was an act of negligence on the part of an employe for which the employer, Standard Oil Company of California, is liable. (20) The driver pleaded guilty to violation of the vehicle code and was fined in the Municipal Court of Los Angeles. This plea was admitted into evidence against him only. As an admission of negligence, after the event, it was not binding on the employer. At the oral argument, I pressed the question whether Etzel was guilty of contributory negligence. A review of the facts in the light of the law of California, which governs leads me to the conclusion that there was no contributory negligence.

The contributory negligence which bars recovery must be a cooperating cause. (21) It appears from Etzel's testimony and that of a disinterested witness who was standing on the curb, that Etzel looked north before stepping into the cross walk. He saw the truck at a distance which made it certain that the driver of the truck would see him and yield to his superior right to cross in a marked cross walk. Had the driver taken ordinary precautions, the distance was sufficient to have allowed Etzel to pass unharmed. The driver testified that he saw Etzel; that, at the time, Etzel was not looking in his direction, but that he thought he would look up in time to see the truck coming. He did not stop his truck or swerve it from its path until it was actually upon Etzel. [22] Having once looked in the direction from which danger was coming and ascertained the position of the truck, Etzel was not bound to continue looking to the north and to the south. Even if he had miscalculated the distance, he

could not be charged with contributory negligence. And the fact that he may have looked in the opposite direction before reaching the center of Figueroa Street, in order to see if automobiles were approaching from that direction, if it was a fault, was not a negligent act co-operating or contributing to the injury.

As said by the Supreme Court of California:

> "Respondent testified that before she attempted to cross the street she looked to her left and saw the truck at a distance of approximately 125 feet away, and she calculated she could cross to the street car in safety. We think she had a right to assume that an observance of laws and a reasonable regard for the safety of others on the part of the driver of the truck would not require that she should keep a constant eye upon him under the circumstances of the case. He could have seen her hurrying for the car as did others, and it was his primary duty to have done so." (22) (Emphasis added)

The truth is, as the driver admitted, he took a chance that Etzel would stop in the cross walk, allow him to pass and yield the right of way to him. But he had no right to expect that, because the law required him to yield. So we have the not uncommon case of a driver taking the risk of missing a pedestrian, and, unfortunately, not missing.

One more contention remains to be dealt with. On March 6, 1944, Etzel settled his claim against the two

defendants for the sum of [23] $300.00. He executed a "release in full" which stated, among other things, "I hereby release and dis harge Standard Oil Company of California and Ira Boone, of and from any and all claims and demands which I now have or may hereafter have", on account of the accident. It is argued that this settlement precludes recovery by the Government. We do not agree. It is true that a single claim for personal injuries cannot be split, and that a release operates as a satisfaction of whatever claims could have been asserted. (23). But these limitations apply only to the claims which the person executing the release has. They do not apply to a claim arising from the same accident which another person may have, independent of the injured person, because of his relationship to him. The cases already cited make it clear that in a case of this character, the two causes of action co-exist and are independent of each other. (24) And as Etzel incurred no loss through hospitalization, and the wages for the period had to be, and actually were, paid to him by the Government, the settlement of his claim was limited to compensation to him for his suffering, consequent upon his physical injuries. (25).

Judgment will, therefore be for the plaintiff.

Dated this 18th day of May, 1945.

LEON R. YANKWICH

Judge [24]

NOTES TO TEXT

1. 54 Stats. 885, 50 U. S. C. A. App. 303(d); Army Regulation 40-505, Sec. 2.
2. 54 Stats. 886, 50 U. S. C. A. App. 303(d), and see: 55 Stats. 800, 10 U. S. C. A. 2; 56 Stats. 363, 37 U. S. C. A. 109.
3. Hayes v. Illinois Terminal Transportation Co., 1936, 363 Ill. 397; 2 N. E. (2d) 309; Goldstein v. State, 1938, 281 N. Y. 396; 24 N. E. (2) 97; Lind v. Nebraska National Guard, 1944, 12 N. W. (2) 652.
4. State v. Industrial Commission, 1925, 186 Wis. 1, 202 N. W. 191; Baker v. State, 1931, 200 N. C. 232, 156 S. E. 919; Globe Indemnity Co. v. Forrest, 1935, 165 Va. 267; 182 S. E. 215; Andrews v. State, 1939, 53 Ariz. 575; 90 P. (2) 995.
5. See my opinions in Didier v. Crescent Wharf & Warehouse Co., 1936, D. C. Calif., 15 Fed. Sup. 91, 93-94; Trudenich v. Marshall, 1940, D. C. Wash. 34 Fed. Sup. 486, 487.
6. Darmour Productions Corp. v. Herbert M. Baruch Corp., 1933, 135 C. A. 351.
7. 18 R. C. L., 542; Holdsworth, History English Law, 1922, 3rd Ed. Vol. 8, p. 429; Adm. Commissioners v. S. S. Amerika, (1917) A. C. 38, 44-49; (per Lord Parker), 53-54 (per Lord Sumner); Attorney General v. Valle-Jones, (1935) 2 K. B. 209.
8. Restatement of Torts, Sec. 703; 20 R. C. L. 614, 616. [25]
9. Restatement of Torts, Sec. 693; 41 C. J. S. Husband and Wife, Sec. 401; Lansburgh & Bros. Inc. v. Clark, 1942, U. S. App. D. C. 127 F. (2) 331.

10. 20 R. C. L. 615-616; Lansburgh & Bros., Inc. v. Clark, 1942, U. S. App. D. C., 127 F. (2) 331. And see cases cited in Footnotes 7, 8 and 9.

11. 6 C. J. S. Army and Navy, Sec. 21; In re Grimley, 1890, 137 U. S. 147; In re Morrissey, 1890, 137 U. S. 157; Selective Draft Law Cases, 1917, 245 U. S. 366; U. S. v. Williams, 1937, 302 U. S. 46; Falbo v. United States, 1944, 320 U. S. 549; Billings v. Truesdell, 1944, 321 U. S. 542; Local Draft Board No. 1 v. Connors, 1941, 9 Cir., 124 F. (2) 388.

12. See sections 1530 and 1533, 50 U. S. C. A. (Articles 58 and 61 of Articles of War of the Armies of the United States).

13. 50 U. S. C. A. App. 301 et seq.

14. Restatement of Torts, Secs. 766-767; Original Ballet Russe v. Ballet Russe, 1943, 2 Cir., 133 F. (2) 187.

15. Attorney General v. Valle-Jones, (1935) 2 K. B. 216-217.

16. Georges Renard: La Valeur de la Loi; 1928, pp. 244-248; Maurice Hauriou: Précis de droit constitutionnel, 2 Ed. 1929, p. 72 et seq.; J. Charmont: La Renaissance du droit naturel, 2nd Ed. 1927, p. 206; Francois Gény: Science et technique positif privé, 1924; IV, pp. 119-125, 153; and see: Charles Grove Haines: Revival of Natural Law Concepts, 1930; Leon R. Yankwich, Back to St. Thomas, 1930, H Opinion No. IV, p. 6. [26]

17. Emile Boutroux, La Conscience individuelle et la loi, Revue methaphysique et de morale, 1906, p. 14.

18. This case illustrates the difficulty which we encounter when we try to squeeze social activities into specific legalistic rubrics such as status, contract, quasi-contract, and the like. Even Sir Henry Maine's famous apothegm "The Movement of the progressive societies has hitherto been a movement from Status to Contract", (Sir Henry Maine, Ancient Law, Pollock Ed., 1930, p. 182) is no longer accepted by legal scholars as the true index of social progress or progress in law. See: Wm. Seagle, The Quest of Law, 1941, p. 252-265.

Sorokin has pointed out that while there have always been certain fundamental types of social relationships, or systems of interaction, they have not remained the same, but have undergone many changes. He, himself, after naming three types,—familistic, contractual and compulsory,—teaches that in the unfoldment of Western culture, institutions may partake of all three with emphasis now on one and then on another.

(Pitrim Sorokin, Social and Cultural Dynamics, 1937, Vol. 3, pp. 23-43)

It is, therefore, unrealistic to shut our eyes to actualities merely because they do not fit into accepted legal concepts.

19. California Vehicle Code, Sec. 560(a)

20. California Vehicle Code, Sec. 402(a) [27]

21. Restatement of Torts, Secs. 463-465; Rush v. Lagomorsino, 1925, 196 Cal. 308, 314; Soares v. Barson, 1936, 12 C. A. (2) 582, 585-586.

22. McQuigg v. Childs, 1931, 213 C. 661, 664; and see: Burgesser v. Bullock's, 1923, 190 C. 643; White v. Davis, 1930, 103 C. A. 531, 541-543; Maggart v. Bell, 1931, 116 C. A. 306; 310-311; Lincoln v. Williams, 1932, 119 C. A. 498, 502; Pinello v. Taylor, 1933, 129 C. A. 508, 513; Salomon v. Meyer, 1934, 1 C. (2) 11, 15-16; Nicholas v. Leslie, 1935, 7 C. A. (2) 590, 595-596; Lowell v. Harris, 1937, 24 C. A. (2) 70, 84; Vanderpool v. Dunham, 1939, 35 C. A. (2) 166.

23. Kidd v. Hillman, 1936, 14 C. A. (2) 507; Franklin v. Franklin, 1945, 67 A. C. A. 830.

24. See cases cited under Footnotes 7, 8 and 9; 41 C. J. S. Husband and Wife, Sec. 401, p. 896. And see: Lansburgh & Bros., Inc. v. Clark, 1944, U. S. App. D. C. 127 F. (2) 331, 332, where Groner, C. J. says: "In the prosecution of these separate and independent rights there is no privity, and a judgment against one is not a bar to an action by another." (Emphasis added)

25. The identical contention was rejected in Attorney General v. Valle-Jones, (1935) 2 K. B. 209, 215; the Court said:

> "As the result of that negligence, the injured man had a claim against the defendant for damages, which in the ordinary case would include any loss of wages during their incapacity and also the cost of any hospital treatment and medical attendance reasonably incurred. The injured men did make a claim against the [28] defendant in which they recovered damages, but those damages cannot have included any sum in respect of loss of earnings, because in fact during

the period of their incapacity they continued to receive their pay from their employers, the Royal Air Force; nor did those damages include any expenses of hospital treatment or medical attendance, because these benefits were provided for the men by the Royal Air Force."

[Endorsed]: Filed May 18, 1945. [29]

[Title of District Court and Cause.]

DECISION

The above-entitled cause heretofore tried, argued, and submitted, is now decided as follows:

For the reasons and upon the grounds stated in the opinion filed herewith, judgment is ordered that the plaintiff do have and recover of and from the defendants the sum of $192.50 with costs herein.

Findings of Fact and judgment to be presented by counsel for the plaintiff in accordance with Local Rule No. 8.

Dated this 18th day of May, 1945.

Opinion filed.

Counsel notified.

[Endorsed]: Filed May 18, 1945. [30]

JENNINGS & BELCHER
Attorneys at Law
510 South Spring Street
Los Angeles 13, Calif. MUtual 2258

June 8, 1945

Honorable Leon Yankwich
Federal Building
Los Angeles 12, California

Re: United States vs. Standard Oil Company

My dear Judge:

There has been served upon us Findings of Fact and Conclusions of Law as prepared by the United States Attorney and submitted to the court. We do not desire to go to the extent of filing formal proposed amendments to the Findings of Fact but do desire to direct the court's attention to one matter therein.

In Paragraph III a finding is made that John Etzel was a member of the Army of the United States of America, "and as such, a servant of the plaintiff."

In the written opinion of the court it is specifically laid down (page 3) that the court arrives at its conclusions "without adopting the strict theory of master and servant which the Government asserts."

The opinion (page 4) points out dissimilarities between the Government-soldier and master-servant relationship.

Again it is asserted (page 4) "A special relation has been created." The opinion then points out that the rights of the Government, which the court holds to attach in this case, arise whether it is called a "status" or "Government and soldier relation."

In the light of these statements by the court in its opinion, we wonder whether the court desires to incorporate a specific finding of master-servant in the Findings of Facts and Conclusions of Law. Such a finding seems to us to be at variance with the real determination of the court in this matter.

Respectfully yours,

JENNINGS & BELCHER
By Frank B. Belcher

FBB:BLH

CC—Cameron L. Lillie,
Assistant U. S. Attorney

[Endorsed]: Filed Jun. 15, 1945. [31]

[Title of District Court and Cause.]

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

The above-entitled cause came on regularly for trial on April 24, 1945, before the Honorable Leon Yankwich, Judge of the United States District Court, Los Angeles, California, sitting without a jury, a jury having been waived. Charles H. Carr, United States Attorney, Ronald Walker and Cameron L. Lillie, Assistant United States Attorneys appearing on behalf of the plaintiff, and Frank B. Belcher, Esquire, appearing as attorney for defendants Standard Oil Company of California, a corporation, and Ira Boone; and oral and documentary evidence having been introduced on behalf of both parties, and the Court having considered the same and heard the arguments of counsel, being fully advised, makes the following findings of fact:

Findings of Fact

I.

That the United States of America is the plaintiff herein, and that this action is brought pursuant to the provisions of Title 28, Section 41 U. S. C. A. [32]

II.

That at all times mentioned in plaintiff's complaint, defendant, Standard Oil Company of California was a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, duly authorized to do, and doing business in the State of California. That defendant, Ira Boone is a resident of the County of Los Angeles, State of California.

III.

That John Etzel was during the period from February 7, 1944 to March 6, 1944, a member of the Army of the United States of America, ~~and as such, a servant of the plaintiff~~. [Note: Words stricken by the Court at the request of counsel for the defendants as per letter dated June 8, 1945 on file. LRY, J]

IV.

That on February 7, 1944, defendant, Standard Oil Company of California, was the owner of a G.M.C. truck, which was then being driven and operated by defendant Ira Boone, as servant and employee of defendant Standard Oil Company of California in the course and scope of his employment, with the knowledge and consent of defendant Standard Oil Company of California.

V.

That on February 7, 1944, John Etzel was in the exercise of due care crossing Figueroa Street in an easterly direction within the confines of the marked pedestrian

walk at the intersection of Figueroa and Eighth Street in the City of Los Angeles, State of California. That at said time and place defendant Ira Boone, acting within the scope of his employment as a servant of defendant, Standard Oil Company of California, negligently and carelessly drove and operated said G.M.C. truck in a southerly direction on said Figueroa Street and caused same to strike John Etzel, who was then within the confines of said pedestrian's walk; that said John Etzel suffered personal injuries as a result thereof. That the negligence of defendant Ira Boone consisted in his failure to yield the right-of-way to said John Etzel, in violation of Section 460(a) of the California Vehicle Code. That the negligence of defendant Ira Boone was the proximate cause of the injury sustained by John Etzel.

VI.

That at the time of said accident and prior thereto, John Etzel was an [33] able bodied man, and that as a result of defendants' negligence and of the resulting injuries to John Etzel, he became subsequently incapacitated, and was confined in a hospital from February 7, 1944 to March 6, 1944. That said John Etzel was physically unable to pursue any work or duties for plaintiff during said period and as a result thereof the services of John Etzel as a member of the Armed Forces were lost to the plaintiff for the said period.

VII.

That under the provisions of the Acts of Congress and the provisions of Army Regulations issued pursuant to the Acts, plaintiff is obligated to pay and did pay John Etzel wages for the period of his disability from February 7, 1944 to March 6, 1944, in the sum of $69.31. That said sum is the fair and reasonable value of the

services lost by plaintiff during Etzel's period of disability. That under the provisions of said Acts and Regulations plaintiff was obligated to and did provide hospital care to John Etzel during the period of disability in the sum of $123.25. That said sum is the fair and reasonable value of the hospitalization furnished. That the negligence of the defendants was the proximate cause of the injuries sustained by John Etzel and resulting loss of services sustained by plaintiff, and of the hospital care furnished by plaintiff to John Etzel.

VIII.

That on February 7, 1944, John Etzel was in the exercise of due care in crossing Figueroa Street within the confines of a pedestrian zone. That the injury and damage sustained by plaintiff was not directly or proximately caused or contributed to by the carelessness or neglect of John Etzel.

IX.

That John Etzel released and discharged defendants and each of them from any and all claims and demands accruing to him, arising out of said accident. That John Etzel sustained no loss of earnings and did not pay nor become obligated to pay any sum for hospitalization during the period of his disability. That John Etzel, therefore, had no claim or cause of action to recover from defendants for loss of earnings or the loss of his hospital care. That no claims asserted by plaintiff in the action have been settled or discharged. [34]

Conclusions of Law

By reason of the foregoing facts, the Court concludes that plaintiff has a cause of action to recover from the defendants the reasonable value of the loss of John Etzel's

services sustained by plaintiff, and the reasonable value of hospital care which plaintiff furnished to John Etzel; that said cause of action is separate, distinct and independent from any cause of action vested in John Etzel, as a result of his personal injuries, and that plaintiff's cause of action was not and could not be affected by the release executed by John Etzel. That plaintiff is entitled to recover from defendants the sum of $192.56 and plaintiff's cost of suit.

It Is So Ordered and the Council for Plaintiff Will Submit Appropriate Judgment Herewith.

Dated: June 15, 1945.

LEON R. YANKWICH
United States District Judge

CHARLES H. CARR
United States Attorney

RONALD WALKER and
CAMERON L. LILLIE
Asst. U. S. Attorneys
Attorneys for Plaintiff

By Cameron L. Lillie
Assistant U. S. Attorney

Approved as to Form as provided by Rule 7(a).

.....

[Endorsed]: Filed Jun. 15, 1945. [35]

In the District Court of the United States in and for the Southern District of California
Central Division
No. 4204-Y Civil

UNITED STATES OF AMERICA,

Plaintiff,

vs.

STANDARD OIL COMPANY OF CALIFORNIA, a corporation, and IRA BOONE,

Defendants.

JUDGMENT

The above entitled cause came on regularly for trial on April 24, 1945, before the Honorable Leon R. Yankwich, Judge of the United States District Court, Los Angeles, Calif., sitting without a jury, a jury having been waived; Charles H. Carr, United States Attorney, Ronald Walker and Cameron L. Lillie, Asst. U. S. Attorneys, appearing on behalf of plaintiff, and Frank B. Belcher, Esq., appearing as attorney for the defendants Standard Oil Co. of California, a corp.; and Ira Boone; and oral and documentary evidence having been introduced on behalf of both parties, and the Court having considered the same and heard the arguments of counsel, being fully advised and having rendered Findings of Fact and Conclusions of Law,

It Is Ordered, Adjudged and Decreed that the United States of America, plaintiff herein, have and recover of and from the Standard Oil Company of California, a corporation, and Ira Boone, the sum of One Hundred Ninety-two Dollars and Fifty-six Cents ($192.56), together with costs taxed at $31.48.

Dated this 15th day of June, 1945.

LEON R. YANKWICH
United States District Judge

Judgment entered Jun. 15, 1945. Docketed Jun. 15, 1945. C. O. Book 33, Page 377, Edmund L. Smith, Clerk, by Louis J. Somers, Deputy.

[Endorsed]: Filed Jun. 15, 1945. [36]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Plaintiff Above Named and to Charles H. Carr and Ronald Walker and Cameron L. Lillie, Its Attorneys:

Notice is hereby given that Standard Oil Company of California, a corporation, and Ira Boone, defendants above named, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on June 15, 1945.

Dated: July 9, 1945.

JENNINGS & BELCHER
By Frank B. Belcher
Attorneys for Defendants
808 Security Building
Los Angeles 13, California
MUtual 2258

[Endorsed]: Filed & mailed copy to Charles H. Carr, Ronald Walker & Cameron L. Lillie, Attys. for Plf. Jul. 11, 1945. [37]

[Title of District Court and Cause.]

STIPULATION AS TO RECORD ON APPEAL

The parties hereto, under the provisions of Rule 75, Subdivision F, do hereby stipulate that they have designated and do hereby designate the parts of the records, proceedings, and evidence to be included on the record of appeal as follows:

The complaint and answer; the findings of fact and conclusions of law; the letter from counsel for defendants to Honorable Leon Yankwich dated June 8, 1945, and referred to in Paragraph III of the findings of fact and filed June 15, 1945; the opinion of the Trial Judge; the judgment appealed from; the notice of appeal; and the following portions of the evidence introduced at the trial, to-wit:

The stipulation of fact signed by the parties and introduced in evidence concerning the expenditures of the plaintiff for hospital service; the release of John Etzel, the injured man, which was introduced in evidence and marked "Defendants' [38] Exhibit A"; and the following oral testimony by John Etzel, a witness for plaintiff:

> "I am and was at the time of the accident a member of the Armed Forces of the United States. I did not enlist but was inducted into the services on February 19, 1941 and I took an oath which was voluntary on my part. Ever since that time I have served continuously in the Armed Forces of the United States. I was injured in an accident which occurred on February 7, 1944. I was in the service at that time. Up to that time I had been able to perform all the necessary duties that had been given to me. As a result of the injuries I was taken to

the Georgia Receiving Hospital and from there they took me to Sawtelle where I remained for twenty-nine days until March seventh. During the time I was in the hospital I was treated for my injuries by doctors.

I was treated by Army doctors. The treatment consisted of taking care of my leg and giving heat treatments and taking stitches out of my head. I had a bad bruised leg and some ten or twelve stitches across my head. During the twenty-nine days I was laid up I was paid my regular compensation by the Government. It amounted to around $69.00, a little over $2.00 per day.

Cross-Examination: My entry into the Armed Services was solely as a result of being inducted. I was drafted in. I went through the usual machinery with the Draft Board in my district and as a result of that I ended up in the Army. That was the method in which [39] my entry into the Army was accomplished. I signed the document entitled "Release in Full" of which you show me a photostatic copy. That is my signature on it. I executed that document or the original of which this is a photostat and I received the consideration expressed in the release, to-wit: $300.00. I kept and retained that sum myself."

It is stipulated that the foregoing constitutes all of the evidence admitted at the trial of this case except the evidence concerning the manner of the happening of the accident in question, which evidence is omitted for the reason that the appellants are not making any point on appeal as to the insufficiency of the evidence either to

prove negligence or the absence of contributory negligence.

The appellants designate as the points on which they intend to rely on appeal the following: That the plaintiff has no cause of action nor any right to recover for the compensation paid to the injured soldier or for the medical or hospital expenditures made by the plaintiff for his treatment; that the injured soldier was not an employee of the plaintiff nor was plaintiff his master nor did the relation of employer or employee exist between them; that the injured soldier executed a complete release which released all right to recover for lost wages or medical or hospital expenses.

The parties respectfully request the Clerk to prepare and transmit to the Appellate Court the record in accordance with this stipulation.

Dated: July 25, 1945.

CHARLES H. CARR,
RONALD WALKER and
CAMERON L. LILLIE
By Cameron L. Lillie
Attorneys for Plaintiff and Respondent

JENNINGS & BELCHER
By Frank B. Belcher
Attorneys for Defendants and Appellants

[Endorsed]: Filed Jul. 25, 1945. [40]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 40 inclusive contain full, true and correct copies of Complaint; Answer, Stipulation of Fact; Defendants' Exhibit A; Opinion; Decision; Letter dated June 8, 1945 to Judge Leon R. Yankwich; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal and Stipulation as to Record on Appeal which constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to $6.85 which sum had been paid to me by appellants.

Witness my hand and the seal of said District Court this 1st day of August, 1945.

[Seal] EDMUND L. SMITH,
Clerk,

By Theodore Hocke,
Chief Deputy Clerk.

[Endorsed]: No. 11114. United States Circuit Court of Appeals for the Ninth Circuit. Standard Oil Company of California, a Corporation, and Ira Boone, Appellants, vs. United States of America, Appellee. Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed August 2, 1945.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 11114

UNITED STATES OF AMERICA,

Plaintiff and Respondent,

vs.

STANDARD OIL COMPANY OF CALIFORNIA, a corporation, and IRA BOONE,

Defendants and Appellants.

DESIGNATION OF RECORD AND STATEMENT OF POINTS UPON WHICH APPELLANTS INTEND TO RELY ON APPEAL

The appellants do hereby adopt as and for the statement of the points upon which the appellants intend to rely on appeal and as and for a designation of the parts of the record necessary for the consideration thereof, the designation as to the record on appeal and as to the points on which appellants intend to rely, all as contained in the stipulation as to the record on appeal heretofore filed in the District Court of the United States in and for the Southern District of California, Central Division, which said stipulation forms a part of the record on appeal.

JENNINGS & BELCHER

By Frank B. Belcher

Attorneys for Defendants and Appellants.

[Affidavit of Service by Mail.]

[Endorsed]: Filed Aug. 2, 1945. Paul P. O'Brien, Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 11114.

STANDARD OIL COMPANY OF CALIFORNIA, A CORPORATION, AND IRA BOONE, APPELLANTS

vs.

UNITED STATES OF AMERICA, APPELLEE

Upon appeal from the District Court of the United States for the Southern District of California, Central Division

Proceedings had in the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals for the Ninth Circuit

Excerpt from Proceedings of Tuesday, January 8, 1946
Before MATHEWS, BONE, and ORR, Circuit Judges

Order of submission

Ordered appeal herein argued by Mr. H. R. Gaither, Jr., counsel for appellant, Standard Oil Company of California, and by Mr. Cameron L. Lillie, Assistant United States Attorney, counsel for appellee, and submitted to the court for consideration and decision.

United States Circuit Court of Appeals for the Ninth Circuit

Excerpt from Proceedings of Thursday, February 14, 1946

Before MATHEWS, BONE, and ORR, Circuit Judges

Order directing filing of opinion and filing and recording of judgment

ORDERED that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the clerk, and that a judgment be filed and recorded in the minutes of this court in accordance with the opinion rendered.

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 11114. Feb. 14, 1946

STANDARD OIL COMPANY OF CALIFORNIA, A CORPORATION, AND IRA BOONE, APPELLANTS

vs.

UNITED STATES OF AMERICA, APPELLEE

Upon appeal from the District Court of the United States for the Southern District of California, Central Division

Before MATHEWS, BONE, and ORR, Circuit Judges

BONE, Circuit Judge.

This is an appeal from a judgment of the above mentioned District Court awarding a sum to the appellee, United States of America, for the loss of services to it of a member of its armed forces.

The action grows out of a traffic accident which occurred on February 7, 1944, in Los Angeles, California, in which a truck of appellant, Standard Oil Company, driven at the time of the accident by appellant, Ira Boone, an employee of Standard Oil, collided with and injured John Etzel, a soldier in the Army of the United States. As a result of these injuries Etzel was unable to perform his duties as a soldier for a period of 29 days.

Etzel's pay during the period of his incapacity amounted to $69.31. He also received army medical care and hospitalization, the reasonable and stipulated value of which was $123.25. On March 16, 1944 Etzel, in return for the sum of $300, executed a release in full to both appellants for his personal injuries.

The Government instituted suit in the court below on April 24, 1945 to recover the total of its payments in wages and medical care during Etzel's incapacity ($192.56), on the theory that "as a result [of the accident] the services of John Etzel were lost to the plaintiff for the aforesaid perod [29 days], and also by reason thereof the plaintiff became liable to pay, and did pay John Etzel as compensation * * * [$69.31 and] * * * expended for hospital care, the sum of $123.25." The lower court gave judgment for plaintiff in the total of these two amounts. The judge was of the opinion that the government-soldier relationship is a "status" similar to that of master and servant, parent and child, or husband and wife, and that therefore, the government has a cause of action for loss of a soldier's services similar to

that of a master for loss of the services of his servant, a parent for those of his child, et cetera.

Appellants do not appeal from the trial court's finding that Boone's negligence caused the injury, but from its finding that the government has a cause of action for loss of a soldier's services. This is the question before this court. This case is one of first impression in this country.[1] At the outset we are confronted with the problem of what law should apply. There is no federal statute which might afford the government a means for bringing this action and it has been held that "when the United States comes into Court to assert a claim it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter." United States v. The Thekla, 266 U. S. 328, 339, 340, and see United States v. Moscow-Idaho Seed Co., 92 F. 2d 170, 173, 174 (CCA-9). Aside from any federal legislation conferring a right of subrogation or indemnification upon the United States, it would seem that the state rules of substantive common law would govern an action brought by the United States in the role of a private litigant. Erie R. Co. v. Tompkins, 304 U. S. 64, 71, 78; United States v. Moscow-Idaho Seed Co., supra, pp. 173, 174.

Appellant maintains that § 49 of the Civil Code of California is controlling and we are inclined to agree. Appellee does not argue the matter in the briefs, but on oral argument government counsel seemed persuaded that the issue must be determined by California law.

As stated above, the government's sole argument in the court below and in this court is that the relation between government and soldier is that of master and servant, or, at least, a relation analogous thereto. The right of a master to sue for the loss of services of his servant is an old remedy at common law. The action appears to have arisen when the basis of society was that of "status" and when there was no procedure in the King's courts for enforcing a simple contract. In that early day, the servant was looked upon as a member of the master's family, and, thus, the action was similar to writs of trespass for injury to a wife or child, or for debauching a wife, daugher, or female servant. See

[1] The Court of King's Bench and the High Court of Australia have considered similar cases: Attorney-General v. Valle-Jones [1935] 2 K. B. 209, and The Commonwealth v. Quince [1944] Argus Law Reports p. 50; [1943] Queensland Law Reporter p. 91; also, Queensland Justices of the Peace Issue (Suppl.), v. 37, p. 137, December 31, 1943. Although the facts of the Valle-Jones case are similar to those of the case at bar we do not deem the case of help to us on the principal question before this court, i. e., the right of the Government to maintain this action at common law. The court in the Valle-Jones case does not discuss the matter, and on p. 213 of 2 K. B., the report shows that the defendant admitted that the government had a cause of action for loss of services. The Quince case is more helpful on this issue and is mentioned infra. Counsel state that it was not brought to the lower court's attention. In a recent case on a similar state of facts, U. S. v. Atlantic Coast L. R. Co. (Jan. 30, 1946), D. C., No. Car., E. D., #271-Civil, Gilliam, J., held contrary to the lower court's opinion in the present case.

Admiralty Commissioners v. S. S. Amerika [1917], A. C. 38, 44, 45, 54 et seq.; Holdsworth, History of English Law, v. 8, p. 429; Wigmore, Interference With Social Relations, 21 Am. L. Rev. 764, 765-769; Green, Relational Interests, 29 Ill. Law. Rev. 460, 1041, 1042:

"Today the master-servant relation is generally based on contract. Therefore, the master's cause of action for loss of his employee's services remains as an anomaly in the law for '* * * while intentionally to bring about a breach of contract may give rise to a cause of action, Angle v. Chicago, St. P. M. & O. R. Co., 151 U. S. 1, 38 L. ed. 55, 14 Sup. Ct. Rep. 240, no authority need be cited to show that, as a general rule, at least, a tort to the person or property of one man does not make the tort-feasor liable to another merely because the injured person was under a contract with that other, unknown to the doer of the wrong. See National Sav. Bank v. Ward, 100 U. S. 195, 25 L. ed. 621. The law does not spread its protection so far.' Robbins Dry Dock & Repair Co. v. Flint, 275 U. S. 303, 309. See also Admiralty Commissioners v. S. S. Amerika, supra; Pollock on Torts (14th ed., 1939), p. 55; and compare The Federal No. 2, 21 F. 2d 313; Buckley v. Gray, 110 Cal. 339, 42 Pac. 900, 52 Am. St. Rep. 88, 31 L. R. A. 862; Hall v. Barber Door Co., 218 Cal. 412, 418.

In California the master's cause of action for the loss of an employee's services is defined in the California Civil Code § 49, which section is in full as follows:

> "The rights of personal relations forbid:
>
> (a) The abduction or enticement of a child from a parent, or from a guardian entitled to its custody;
>
> (b) The seduction of a person under the age of legal consent;
>
> (c) Any injury to a servant which affects his ability to serve his master, other than seduction, abduction or criminal conversation."

If this section of the Civil Code governs this case, and we believe it does, the government's case must fail for two reasons: first, because the government-soldier relation is not within the scope of § 49 of the Code, and, second, because the government is not a "master" and the soldier is not a "servant" within the meaning of the Code section.

First. The trial judge deleted his finding of fact that a master-servant relationship existed in this case. He stated in his opinion that the action was based on injury to the "status" or personal relationship existing between government and soldier, and that defendant could not escape liability by claiming that at common

law the relationship "did not have a name". See United States v. Standard Oil Corp., 60 F. Supp. 807, 810. The trial judge is evidently of the opinion that the "modern trend" is towards affording protection to rights arising from statues not protected at common law.[2] In this court, the government has not adopted the trial court's conclusion that interference with the government-soldier relation, standing alone, is a sufficient basis for this suit. The government still argues, as it did in the lower court, that the government-soldier relation is the same as that of master and servant, or analogous thereto.

Whether or not the government-soldier relation is one protected at common law, it does not seem to be within the scope of § 49, for that section definitely limits the causes of action which are based upon an interference with personal relationships to those enumerated in the section. For example, § 49 might have given a cause of action for injuries to parties to other personal relationships similar to that of master and servant alone, i. e., for injuries to an agent, an independent contractor, a partner, a joint adventurer, et cetera. And even if the government-soldier relationship is the basis for an action at common law, it must be noted that § 49, both as amended in 1905, and in 1939, is in derogation of the common law because other personal relations traditionally protected by that law are withdrawn from the section.[3] The court said in Burlingame v. Traeger, 101 Cal. App. 365, 371, 281 Pac. 1051: "It must also be borne in mind that 'our codes, of course, were intended as complete revisions of the existing laws upon the subjects embraced therein' (Estate of Carraghar, 181 Cal. 15, 183 Pac. 161, 163), and that their provisions establish the law of this state respecting the subjects to which they relate. (In re Apple, 66 Cal. 432, 6 Pac. 7; McLean v. Blue Point Gravel Min. Co., 51 Cal. 255.) It is only when the code and other statutes are silent that the common law governs." For these reasons we do not believe that the government-servant relationship alone is within the scope of § 49 of the Civil Code.

Second. Since we do not believe that the government-soldier relationship is protected by § 49 of the Civil Code, we must next consider the government's claim that the government-soldier relationship is the same as that of master and servant. If this argu-

[2] The trial court's reliance on the Restatement of Tort. . §§ 766, 767, and Original Ballet Russe v. Ballet Theater, 133 F. 2d 187, do not bear him out. Those authorities do not discuss negligent injury to a contractual relation of employment, but cases of malicious attempts to hurt plaintiff's business and to induce plaintiff's employees to breach their contracts with plaintiff. Such causes of action follow the celebrated case of Lumley v. Gye, 2 E. & B. 216. See Green, Relational Interests, supra, pp. 1043, 1044 ff.

[3] California Stats. 1905, p. 68, withdrew the action of a master for the abduction of his servant; California Stats. 1939, pp. 1245, 3037, withdrew the action for abduction or enticement of a wife from her husband, and the action for the seduction of a person over legal age.

ment is correct, the government will, of course, be brought within the scope of § 49 (c), which subsection may be termed a definition of the master's action at common law. There are, it is granted, some resemblances between the master-servant and government-soldier relationships, but the distinguishing features are so great that we do not feel that the legislature intended the words "servant" and "master" in § 49 (c) to include within their meaning the words "soldier" and "government."

In modern times the freedom of an employee to enter into and to terminate a contract of employment might be said to be the major distinguishing factor between the two relationships. Labor's many other rights and privileges recognized today serve to distinguish even further the position of the modern employee from that of the soldier. Even in peacetime a soldier who enlists is subject to many strict duties and disciplines which are never impressed on the ordinary employee. See e. g. Articles 58 and 61 of the Articles of War, 10 U. S. C. A. §§ 1530, 1533. But whatever the picture in peace, in times of national emergency it is the duty of the citizen to serve in the protection of his country, and every citizen is a potential soldier under the conscription laws. See Arver v. United States, 245 U. S. 366, 378; United States v. Williams, 302 U. S. 46, 48; Falbo v. United States, 320 U. S. 549, 554; Billings v. Truesdell, 321 U. S. 542, 556; Local Board No. 1 v. Connors, 124 F. 2d 388 (C. C. A. 9); compare, The Commonwealth v. Quince, supra, [1944] Argus Law Reports, 50; Hayes v. Illinois Terminal Transportation Co., 363 Ill. 397, 2 N. E. 2d 309; Goldstein v. State of New York, 281 N. Y. 396, 24 N. E. 2d 97; Lind v. Nebraska National Guard, 12 N. W. 2d 652. Thus the fact that this soldier (Etzel) had entered the army under the draft for the duration of the war emergency makes the position of the soldier even less comparable to that of an employee. The trial judge ably points out the distinctions between soldier and employee at 60 F. Supp. 810. See also McArthur v. The King (Canada) [1943] Ex. C. R. 77, [1943] 3 D. L. R. 225.

But the government argues that because at common law the relation between master and servant was that of "status" there is a similarity to the government-soldier relationship which is also recognized as a "status". In re Grimley, 137 U. S. 147, 151–154; In re Morrisey, 137 U. S. 157, 159; United States v. Williams, supra, at pp. 48, 49; Billings v. Truesdell, supra, at p. 553; see also the dissenting opinions in The Commonwealth v. Quince, supra. As the trial court noted, it is strange that in all these years of wars the government has never asserted this cause of action before. The answer may partially lie in the fact that modern the action

of a master for loss of services is little used.[4] The fact that a sovereign has only asserted this cause of action at common law in a few recent cases does not, of course, demonstrate that the government cannot come within the scope of the master's action for loss of services. However, it is indicative of the fact.

We are not impressed by the government's attempted analogy between the relations of master and servant and government and soldier based on the theory of "status". There were many relationships based on status at early common law and there are today, i. e., parent and child, husband and wife, citizen and sovereign. To attempt to analogize the two relationships merely because both are based on a "status" seems without merit. And this is so even though there is a right to control and a duty to serve in both of the statutes. See majority opinions, The Commonwealth v. Quince, supra. We agree with the trial court that the relationship between government and soldier is more legislative than contractual. See United States v. Williams, supra, 302 U.S. pp. 46, 48. For these reasons we cannot conclude that the common law action of a master for loss of his servant's services as defined in § 49 (c) of the Civil Code, or as it stands at common law, may be adopted by the government.

Our disposition of the case makes it unnecessary for us to consider whether the government has asked for the proper damages in this case,[5] except insofar as the government, in the absence of statutory authority, might have a right of subrogation. "A court of equity may give restitution to the plaintiff and prevent unjust enrichment of the defendant, where the plaintiff's property has been used in discharging an obligation owed by the defendant * * *, by creating in the plaintiff rights similar to those which the obligee * * * had before the obligation was discharged." Restatement of Restitution § 162, Comment a.

However, it appears in this case that defendant has already discharged this obligation to the principal party, Etzel. In the United States the prevailing rule seems to be that an injured person may recover for wages lost and medical expenses incurred

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[4] Darmour Productions Corp. v. Herbert M. Baruch Corp., 135 Cal. App. 351 is the only California case involving such action by a master that court or counsel have found. See comment, 23 Cal. Law Rev. 420, which also suggests, among other limitations, that, contrary to the Darmour Production case, actions under § 49 should be limited to menial servants. See also, Green Relations' Interests, supra, pp. 1042, 1043.

[5] It seems at common law that the master's action was for the actual losses that he suffered from the inability of his servant to serve, and not for wages and medical expenses paid during the servant's incapacity. "A master also may bring an action against any man for beating or maiming his servant, but in such case he must assign, as a special reason for so doing, his own damage by the loss of his services" Cooley's Blackstone's Commentaries (4th ed.) v. I, p. 367. Cf. De La Torre v. Johnson, 200 Cal. 754, 759, 254 Pac. 1105; Interstate Tel. & Tel. v. Public Service Elec. Co., 86 N. J. L. 26, 90 A. 1062; Philadelphia v. Phil. Transit Co., 337 Pa. 1, 10 A. 2d 434; Chelsea Moving & Trucking Co. v. Ross Towboat Co., 280 Mass. 282, 182 N. E. 477; The Federal No. 2, supra, p. 314.

during his incapacity even though such amounts were supplied by insurance, a contract of employment, or gratuitously.[6] Cunnien v. Superior Iron Works, 175 Wisc. 172, 184 N. W. 767; Shea v. Rettie, 287 Mass. 454, 192 N. E. 44, and see notes to these cases in 18 A. L. R. 678 and 95 A. L. R. 571, also see 128 A. L. R. 686; Gatzweiler v. Milwaukee Elec. Ry. & Light Co., 136 Wisc. 34, 116 N. W. 633; Harding v. Town of Townshend, 43 Vt. 536, 538–542; 4 Restatement of Torts, § 920, Comment e, § 924, Comment c. The California courts have approved this rule. Peri v. L. A. Junction Ry., 22 Cal. (2d) 111, 113; Gastine v. Ewing, 65 C. A. 2d 131, 150 P. 2d 26; Puryell v. Goldberg, 34 C. A. 2d 344, 350, 93 P. 2d 578; Benicich v. Market St. Ry. Co., 29 C. A. 2d 641, 647; Inglewood Park Mausoleum v. Ferguson, 9 C. A. 2d 217; Reichle v. Hazie, 22 C. A. 2d 543, 547, 71 P. 2d 849; Loggie v. Interstate Transit Co., 108 C. A. 165, 169, 291 P. 618. Therefore, Etzel's release to the defendants, which extended "to all claims of every nature and kind whatsoever", covered his lost wages and medical expenses as elements of damage. These are the amounts which the United States here seeks to recover.[7] Thus even if we may assume that the United States may be subrogated, without statutory authority, to the soldier's claims, it cannot be subrogated to such claims here because defendants have already paid Etzel for these losses. For the same reason the government would have no right of indemnification, even under the broad rule of Restatement of Restitution, § 76. Compare § 2772, California Civil Code. In Crab Orchard Improvement Co. v. Chesapeake & Ohio Ry., 115 F. 2d 277, and The Federal No. 2, supra, 21 F. 2d 313 it is held that in the absence of contractual or statutory right, the party paying wages and medical expenses is not entitled to subrogation or indemnification. Note also the California rule as to releases and splitting causes of action, Kidd v. Hillman, 14 C. A. 2d 507, 58 P. 2d 662.

Furthermore, it seems clear that Congress did not intend that for tortious injuries to a soldier in time of war, the government should be subrogated to the soldier's claims for damages. It will be noted that Congress has provided that the government should have the privileges of assignment or subrogation in other and somewhat similar situations. In the Federal Employee's Com-

[6] In its findings of fact the lower court found that the soldier, Etzel, had no claim against defendants for wages or medical care since these were supplied by the United States. As authority for this finding, the court, in its opinion, cited Attorney General v. Valle Jones, supra (1935), 2 K. B., at p. 215. However, it seems the lower court has followed the English rule and not the prevailing American doctrine. See cases cited above, and note comparison of English and American rules in 18 A. L. R. 678 and 95 A. L. R. 571.

[7] Provision for medical treatment in this case is found in Army Regulations 40-505, and for pay under Pay Readjustment Act of 1942, as amended, 37 U. S. C. A. §§ 101–120, see §109. The government states that pay during this type of incapacity is not withheld. Compare Army Regulations, 35-1420, par. 3a, 10 U. S. C. A. § 847a; Article of War 107, 10 U. S. C. A. § 1579.

pensation Act, 5 U. S. C. A. §§ 751–800, it is provided that before benefits may be received the government may require the beneficiary to assign to the government his rights against the negligent party or to prosecute the action in his own name. (See § 776.) And by § 797 members of the Officers' Reserve Corps and the Enlisted Reserve Corps of the Army are in time of peace made subject to and given the benefits of the Act. Also the World War Veterans' Act, 38 U. S. C. A. §§ 421–576, makes similar provisions (§ 502) with regard to any cause of action that a person entitled to benefits may have against a third person. Cf. The Steel Inventor, 36 F. 2d 399.

In our opinion authority for this action should come through legislation, and not from an attempt by the courts either to enlarge the scope of an ancient common law cause of action, or to create a new one.

Reversed.

(Endorsed:) Opinion. Filed Feb. 14, 1946. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit

No. 11114

STANDARD OIL COMPANY OF CALIFORNIA, A CORPORATION, AND IRA BOONE, APPELLANTS

vs.

UNITED STATES OF AMERICA, APPELLEE

Judgment

Upon appeal from the District Court of the United States for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Southern District of California, Central Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is, reversed.

(Endorsed:) Judgment. Filed and entered February 14, 1946. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit

Excerpt from Proceedings of Friday, March 29, 1946

Before MATHEWS, BONE, and ORR, Circuit Judges

Order denying petition for a rehearing

Upon consideration thereof, it is ordered that the petition of appellee, filed March 15, 1946, and within time allowed therefor by rule of court, for a rehearing of above cause, be, and hereby is denied.

United States Circuit Court of Appeals for the Ninth Circuit

(Title of Cause and Number)

No. 11114

STANDARD OIL COMPANY OF CALIFORNIA, A CORPORATION, AND IRA BOONE, APPELLANTS

vs.

UNITED STATES OF AMERICA, APPELLEE

Certificate of Clerk, U. S. Circuit Court of Appeals for the Ninth Circuit, to record certified under Rule 38 of the Revised Rules of the Supreme Court of the United States.

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing fifty-three (53) pages, numbered from and including 1 to and including 53, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of Hon. J. Howard McGrath, Solicitor General of United States, counsel for the appellee, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

ATTEST my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 22nd day of May, 1946.

[SEAL] (S) Paul P. O'Brien,
PAUL P. O'BRIEN, *Clerk.*

U. S. GOVERNMENT PRINTING OFFICE: 1946

Supreme Court of the United States

No. 235—October Term, 1946

Order allowing certiorari

Filed October 14, 1946

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1946

No. 235

In the Supreme Court of the United States

OCTOBER TERM, 1946

UNITED STATES OF AMERICA, PETITIONER

v.

STANDARD OIL COMPANY OF CALIFORNIA AND IRA BOONE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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No. 235

UNITED STATES OF AMERICA, PETITIONER

v.

STANDARD OIL COMPANY OF CALIFORNIA AND IRA BOONE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit entered in the above-entitled case on February 14, 1946.

OPINIONS BELOW

The opinion of the District Court of the United States for the Southern District of California (R. 10–25) is reported at 60 F. Supp. 807. The opinion of the Circuit Court of Appeals for the Ninth Circuit (R. 41–48) is reported at 153 F. 2d 958.

JURISDICTION

The judgment of the court below was entered on February 14, 1946. (R. 48). A petition for rehearing, filed by the United States, was denied on March 29, 1946 (R. 49). The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the United States may recover from third-party tortfeasors the salary paid to, and the hospital expenses incurred in treating, members of its armed forces during the period their services are lost to the Government due to the negligence of such tortfeasors.

2. Whether the right to such recoveries is to be determined by state or federal law.

STATUTE INVOLVED

Section 49 of the California Civil Code, as amended, provides as follows:

> § 49. *Abduction, Seduction, Injury to Servant.*—The rights of personal relations forbid:
>
> (a) The abduction or enticement of a child from a parent, or from a guardian entitled to its custody;
>
> (b) The seduction of a person under the age of legal consent;
>
> (c) Any injury to a servant which affects his ability to serve his master, other than seduction, abduction or criminal conversation.

STATEMENT

On January 23, 1945, the United States filed a complaint in the United States District Court for the Southern District of California, Central Division (R. 2–4), to recover the salary paid, and the reasonable value of the hospital care furnished, by the United States to John Etzel, a private in the Army of the United States, during the period of his incapacitation due to injuries he suffered on February 7, 1944, as a result of the allegedly negligent operation by respondent Boone of a truck owned by respondent Standard Oil Company of California. The complaint sought judgment in the amount of $192.56, consisting of $123.25 for hospital care and $69.31 for salary paid during the period Etzel's services were lost to the Government (R. 4).[1]

Respondent's answer (R. 5–7) denied that Etzel was the servant of the United States; denied that Boone was an agent of the respondent Standard Oil Company; denied that Etzel had been injured as the result of respondents' negligence; and affirmatively pleaded that the complaint failed to state a claim upon which relief could be granted; that Etzel was contributorily negligent; and that Etzel, on March 16, 1944, had executed a general release, discharging respondents from liability for the accident.

[1] It was later stipulated between the parties that $123.25 in fact represented "the fair and reasonable value of hospital care necessarily required for John Etzel * * *" (R. 8).

Following a trial without jury, the district court entered findings of fact, conclusions of law (R. 27–31), and a judgment awarding damages in the amount sought by the United States (R. 32–33). In its opinion (R. 10–25) and findings, the court held that Etzel's injuries and the consequent loss of his services as a soldier to the Government had been caused solely by respondents' negligence; that in such circumstances the Government was entitled to recover in the amount and for the items of damage alleged; and that Etzel's release was ineffective to discharge respondents' independent liability to the Government for the salary it paid Etzel and for the hospital expenses it incurred in treating him.

On appeal (R. 33) the court below reversed (R. 40–48), holding that the existence of a right of action in the Government for the items of damage alleged was a question to be determined by reference to California law, and that the Government-soldier status was not one protected by Section 49 of the California Civil Code since it did not fall within the "master-servant" category contained therein. Finally, the court held that the general release executed by Etzel barred the United States from asserting any right of subrogation or indemnification against the respondents for the hospital expenses incurred or salary paid Etzel.

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that the United States may not recover from a tortfeasor the hospital expenses incurred in treating, and the salary paid to, a member of the armed forces during the period of his incapacitation due to injuries inflicted upon him by the tortfeasor.

2. In holding that the existence of such right of recovery is a question to be determined by state rather than federal law.

3. In failing to hold that under federal law such right of recovery exists.

4. In holding that a release given the tortfeasor by the injured soldier bars the United States from asserting its independent right of recovery based on loss of the soldier's services.

5. In reversing the judgment of the district court.

REASONS FOR GRANTING THE WRIT

In the present case, and in the numerous similar instances where the United States have been deprived of the services of Army personnel because injured by the negligent actions of third persons, the Government has, under the pertinent statutes and Army regulations, provided hospitalization and medical care and paid their salaries during the period of their incapacitation.[2] Whether in

[2] *With respect to hospital care:* Under the broad authority of the Secretary of War to issue regulations for the

such circumstances the United States may recover from the tortfeasor the salary so paid, and the reasonable value of the hospital and medical care so furnished, is a question of first impression in this country. It is a question of importance, which, we submit, should be decided by this Court. Upwards of 450 instances of negligently inflicted injuries upon soldiers of the United States, requiring hospitalization at Government expense, and the payment of compensation during incapacitation, have been reported by the War Department

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hospitalization and medical care of all military personnel (see the Act of July 15, 1939, c. 282, 53 Stat. 1042, 10 U. S. C. 455e), medical attendance was authorized for all enlisted men at the time here in question. Par. 2b (1), Army Regulations 40–505, September 1, 1942. Substantially similar provisions were contained in Army Regulations 40–505, December 5, 1945, as changed by Changes No. 1, February 28, 1946, now in force. Under Section 3 (d) of the Selective Training and Service Act of 1940, 54 Stat. 885, 886, 50 U. S. C. App. 303 (d), inducted personnel are entitled to all benefits accorded other enlisted men.

With respect to pay during incapacitation: Pay otherwise authorized (by the Pay Readjustment Act of 1942 as amended, 56 Stat. 359, 1037, 37 U. S. C., Supp. IV, 101 *et seq.*) may only be withheld, in the absence of court-martial or certain board proceedings, during unauthorized absence from duty in excess of twenty-four hours (Par. 3a, Army Regulations 35–1420, December 15, 1939), or because of the effects of a disease attributable to the intemperate use of alcoholics or habit-forming drugs. Sec. 1 of the Act of May 17, 1926, 44 Stat. 557, 10 U. S. C. 847a; Army Regulations 35–1440, November 17, 1944. As Etzel's absence from duty was not occasioned by any of the above causes, the Army was legally bound to compensate, and did compensate, Etzel for the period he was hospitalized.

to the Department of Justice in the past three years. Additional instances are presently being reported to the War Department at a rate approximating 40 a month. The suit at bar is representative of a number of actions already commenced by the United States against the third-party tortfeasors.[3]

1. The right of the Government to recover damages of the nature sought here is grounded on well-settled common-law principles of legal liability. *Attorney General* v. *Vallee-Jones*, [1935] 2 K. B. 209. There the Crown was awarded damages for the loss of services of two aircraftsmen of the Royal Air Force tortiously injured by the act of a third party, on the strength of the common-law action for loss of services of a servant, the familiar trespass *per quod servitium amisit*; and it was held that the value of the hospitalization furnished and the wages paid the men while they were incapacitated constituted an appropriate measure of dam-

[3] In *United States* v. *Atlantic Coast Line R. Co.*, 64 F. Supp. 289, the District Court for the Eastern District of North Carolina dismissed an action to recover for the interim loss of services of a soldier who died shortly after being injured, on the ground that no master-servant relationship existed between the Government and the soldier. In *United States* v. *Klein*, 153 F. 2d 55 (C. C. A. 8), an action to recover the wages and medical treatment furnished an injured Civilian Conservation Corps enrollee was dismissed on the ground that the United States Employees' Compensation Act provided the United States a method of recoupment—a method not here available.

ages. In *Commonwealth* v. *Quince*, 68 Comm. L. R. 227, [1944] Argus L. Rep. 50, the High Court of Australia split sharply on the same issues; three of the judges held that the action could not be maintained because the Government-soldier status differed from the modern master-servant relationship, while the other two held that the action was well founded.[1]

But examination of the origins and subsequent development of the action of trespass *per quod servitium amisit* negatives the notion that the sovereign-soldier relationship here sought to be protected must be grounded on contract simply because that is the present basis of the master and servant relationship.

The right of a master to recover damages from a third-party tortfeasor whose acts have caused the loss of his retainer's service is one of the oldest known to the common law. Bracton, *f.115; Britton (Nichols' tr., 1901 ed.) 109. The action of trespass *per quod servitium amisit* originated at a time when the relationship was one of status, not founded upon a contract of employment. *Admiralty Commissioners* v. *S. S. Amerika*, [1917] A. C. 38, 44–45; 8 Holdsworth,

[1] Although holding that the action was not maintainable, one of the three majority judges joined the minority in holding that a recovery of hospital expenses and wages would be proper, assuming the relationship was one protected at common law. See 68 Comm. L. R. at 247.

History of English Law (2d ed. 1937) 429.[5] Nor has the absence of a contractual basis for the relationship prevented the application of the doctrine in cognate fields. The master-apprentice relationship, traditionally protected (*Ames* v. *Union Ry.*, 117 Mass. 541; *Hodsoll* v. *Stallebrass*, 11 A. & E. 301; see *Bradford Corp.* v. *Webster*, [1920] 2 K. B. 135), often originated as the result of statutory provisions without the consent of the apprentice (*e. g.*, *Johnson* v. *Dodd*, 56 N. Y. 76), and could not readily be terminated prior to the expiration of the indenture period. A *de facto* relationship of service is sufficient to establish a right of recovery *per quod servitium amisit*, by the father of an adult daughter remaining in his household for loss of services occasioned by injuries consequent upon her seduction. *E. g.*, *Beetham* v. *James*, [1937] K. B. 527. The gist of all such actions is the "master's" loss of services.[6]

[5] As stated by Latham, C. J., in *Commonwealth* v. *Quince*, 68 Comm. L. R. at 237: "The relation between the lord of the manor and his villeins * * * did not depend upon any contract * * *. The rights depended upon rules of law. Accordingly, the remedy of the master for loss of services of a villein was not in its origin associated with any contract of service."

[6] The two cases rejecting this doctrine (*Chelsea Moving Co.* v. *Ross Towboating Co.*, 280 Mass. 292; *Philadelphia* v. *Philadelphia R. T. Co.*, 337 Pa. 1) are out of line with the overwhelming weight of authority (see 18 Cornell L. Q. 292) and were moreover rested upon peculiar state doctrines that to permit an independent recovery by a master would result in the splitting of a cause of action.

And it is upon this precise allegation and proof of loss of services that a father recovers for the loss of services of a child injured by the tortious act of a third person. *Louisville & N. R. R. Co.* v. *Willis*, 83 Ky. 57; *Whitney* v. *Hitchcock*, 4 Denio (N. Y.) 461; *Berringer* v. *Great Eastern Rwy. Co.*, 4 C. P. Div. 163.

It is submitted that the instant case presents precisely those elements which historically gave rise to, and which have continued to vitalize, the doctrine that a parent, husband, or master may recover for the loss of services of his child, wife, apprentice or servant. Certainly if the status of the Government *vis-a-vis* members of its armed forces is not precisely one *in loco parentis*,[1] it is clear that its right to their services is as absolute, if not more so, than was the master's at the time the doctrine took shape. It would seem plainly anomalous to hold that because the formation and continuation of a modern master-servant relationship is more consensual than formerly, protection will not be afforded a relationship clearly

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[1] Enlistment in the Army emancipates a minor from the control of his father. *United States* v. *Williams*, 302 U. S. 46, 49, note 8, and cases there cited; *King* v. *Inhabitants of Rothcefield Greys*, 1 B. & C. 345; see Williams J., in *Commonwealth* v. *Quince*, 68 Comm. L. R. 227, 256. Similarly, enlistment emancipates an apprentice from the control of his master. *Johnson* v. *Dodd*, 56 N. Y. 76. And the control of the sovereign over the soldier has been compared to that of the master over an apprentice. *King* v. *Inhabitants of Norton*, 9 East 206, 210.

approximating statuses historically covered. Cf. *Seas Shipping Co., Inc.*, v. *Sieracki*, No. 365, Oct. T. 1945, decided April 22, 1946; *Commonwealth* v. *Quince, supra*, 68 Comm. L. R. at 235–239, 253–257. Moreover, in its essential elements—the right of selection, control over detail of performance, dismissal, and the duty to pay wages—the Government-soldier relationship is that of master and servant. And if a contract of service be deemed essential, enlistment in the armed services of the United States is contractual (*In re Grimley*, 137 U. S. 147, 151; *In re Morrissey*, 137 U. S. 157, 159; *United States* v. *Williams*, 302 U. S. 46, 49), and since "the status of a citizen properly drafted and that of one who has voluntarily enlisted are the same" (*Selective Draft Law Cases*, 245 U. S. 366, 371), a contract implied in law may be taken as existing between the United States and one inducted. It is submitted that the features adverted to by the court below as distinguishing the Government-soldier status from the ordinary master-servant relationship are not relevant to the point here at issue. For, as we have pointed out above, the gist of an action of trespass *per quod servitium amisit* is the right to and the loss of services.

In view of the foregoing, it is submitted that the release given respondents by Etzel cannot operate to defeat the action. The injury to the servant and to the master are collateral to and not consequent upon each other. The servant

cannot waive the damages of the master, nor is recovery by a servant any bar to a subsequent suit by the master. *Callaghan* v. *Lake Hopatcong Ice Co.*, 69 N. J. L. 100; *Louisville & N. R. R. Co.* v. *Willis*, 83 Ky. 57; *Whitney* v. *Hitchcock*, 4 Denio (N. Y.) 461; *Franklin* v. *Butcher*, 144 Mo. App. 660; *Berringer* v. *Great Eastern Rwy. Co.*, 4 C. P. Div. 163; *Hornketh* v. *Barr*, 8 Serg. & R. (Pa.) 36; *Robert Marys's case*, 9 Coke 111 B; *Commonwealth* v. *Quince*, *supra*; cf. *Lansburgh & Bro.* v. *Clark*, 127 F. 2d 331, 333 (App. D. C.); see Smith, *Master and Servant* (8th ed.) 108. It is to be noted that the aircraftsmen in respect of whose loss of services damages were awarded to the Crown in the *Vallee-Jones* case, *supra*, had theretofore recovered damages for the injury itself from the tortfeasor. [1935] 2 K. B. at 210, 215.

It is thus not a ground for objection that under the "prevailing American doctrine" (R. 47) an injured party may recover from the tortfeasor for wages lost and medical expenses incurred even where these amounts have been furnished him gratuitously, or as a result of insurance. None of the cases cited by the court below as so holding involves an action based upon the independent right to recover for the loss of services of the party injured. In such cases, damages are at large, and the master may recover both for appropriate expenditures for hospital and medical

care and for wages which are paid during the period of incapacitation by reason of the defendant's negligence. 2 Cooley, *Torts* (4th ed.) § 180; *Attorney General* v. *Vallee-Jones, supra; Smaill* v. *Alexander,* 23 N. Z. L. R. 745; *Dixon* v. *Bell,* 1 Stark. 287; see Reeve, *Domestic Relations* (4th ed. 1888) 487; *Hodsoll* v. *Stallebrass,* 11 A. & E. 301; *Woodward* v. *Washburn,* 3 Denio (N. Y.) 369, 371.[8]

2. We submit that the holding of the court below that the United States' right to recovery in the instant circumstances must be determined by reference to Section 49 of the California Civil Code constitutes error, and is in conflict with principles repeatedly enunciated by this Court. *United States* v. *Allegheny County,* 322 U. S. 174; *Clearfield Trust Co.* v. *United States,* 318 U. S. 363; *Board of Commissioners* v. *United States,*

[8] Moreover, it may be independently noted that the prevailing rule has been primarily established in cases where the defense has been raised against the injured party in instances where the person supplying his wages and hospital expenses did so gratuitously, or under a contract of insurance; that the rule has not been universally adopted; and that in other states the issue of whether the payments are in fact gratuitous will govern the result. See the cases collected in 18 A. L. R. 678–683 and 98 A. L. R. 575–579; and compare *Illinois Central R. Co.* v. *Porter,* 117 Tenn. 13, 31–32 (tortfeasor not entitled to deduct from ordinarily consequential damages salary actually paid injured postal clerk because, under postal laws, payment during illness was a matter for discretion of postal officials and hence could be considered a gratuity).

308 U. S. 343; *cf. D'Oench, Duhme & Co.* v. *Federal Deposit Ins. Corp.*, 315 U. S. 447; *Deitrick* v. *Greaney*, 309 U. S. 190. As noted by the court below, the California Code affords a right of action against the third-party tortfeasor where the relationship is one of master and servant. Nothing, however, more graphically underlines the error of the court below than its holding that it was the "intent" of the state legislature in enacting Section 49 to preclude the Government-soldier status from protection. Since that status exists only in the Federal domain, it would seem clear that the state legislature did not enact Section 49 with the intent of either including or excluding that relationship from the protection therein extended.

It is, moreover, plain that if, as we believe, the nature of the relationship is such that recovery may be had, a state legislature could not abridge such a right. As this Court stated with respect to Government war procurement contracts, "The validity and construction of contracts through which the United States is exercising its constitutional functions, their consequences on the rights and obligations of the parties, the titles or liens which they create or permit, all present questions of federal law not controlled by the law of any State." *United States* v. *Allegheny County*, 322 U. S. 174, 183. The nature of the relationship between the Government and soldier, and the rights arising in the Government there-

from, are equally immune from State control. In short, had it been authoritatively determined that the United States had a cause of action against one who tortiously injured one of its soldiers, prior to the passage of the California Code, no subsequent act of the state legislature could prevent the Government from asserting its right of action in the federal courts. *United States* v. *Allegheny County, loc. cit. supra,* and cases cited. And while in determining "the applicable federal rule," this Court has "occasionally selected state law" (*Clearfield Trust Co.* v. *United States,* 318 U. S. 363, 367), such a course, here as there, "would subject the rights * * * of the United States, to exceptional uncertainty", whereas "the desirability of a uniform rule is plain" (*ibid.*).*

CONCLUSION

For the reasons stated above, it is respectfully submitted that this petition should be granted.

J. HOWARD MCGRATH,
Solicitor General.

JUNE 1946.

* The court below stated (R. 42) that counsel for the Government in substance conceded that state law was controlling. In order to remove any misapprehension in that regard, the United States, in its motion for a rehearing, set forth at length its position that federal and not state law was controlling. The court below denied that motion without opinion (R. 49), thus indicating that it did not rest its opinion upon any supposed concession by counsel.

U. S. GOVERNMENT PRINTING OFFICE: 1946

No. 235

In the Supreme Court of the United States

OCTOBER TERM, 1946

THE UNITED STATES OF AMERICA, PETITIONER

v.

STANDARD OIL COMPANY OF CALIFORNIA AND IRA BOONE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the United States District Court for the Southern District of California (R. 10–25) is reported at 60 F. Supp. 807. The opinion of the Circuit Court of Appeals for the Ninth Circuit (R. 41–48) is reported at 153 F. 2d 958.

JURISDICTION

The judgment of the court below was entered on February 14, 1946 (R. 48). A petition for rehearing, filed by the United States, was denied on March 29, 1946 (R. 49). The petition for writ of certiorari was filed on June 26, 1946, and was

granted on October 14, 1946 (R. 50). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the United States may recover from third-party tortfeasors the salary paid to, and the hospital expenses incurred in treating, members of its armed forces during the period their services are lost to the Government due to the negligence of such tortfeasors.

2. Whether the right to such recovery is to be determined by state or federal law.

3. Whether, if the United States has a right to recover, its recovery may be barred by a release executed by the injured soldier.

STATUTE INVOLVED

Section 49 of the California Civil Code, as amended, provides as follows:

> § 49. *Abduction, Seduction, Injury, to Servant.*—The rights of personal relations forbid:
>
> (a) The abduction or enticement of a child from a parent, or from a guardian entitled to its custody;
>
> (b) The seduction of a person under the age of legal consent;
>
> (c) Any injury to a servant which affects his ability to serve his master, other than seduction, abduction or criminal conversation.

STATEMENT

On January 23, 1945, the United States filed a complaint in the United States District Court for the Southern District of California, Central Division (R. 2–4) to recover the salary paid, and the reasonable value of the medical expenses and hospital care furnished by the United States to its servant, John Etzel, a soldier in the Army of the United States, during the period of his incapacitation due to injuries he suffered on February 7, 1944, as a result of the negligent operation by respondent Boone of a truck owned by respondent Standard Oil Company of California. The complaint sought judgment in the amount of $192.56, consisting of $123.25 for hospital care and $69.31 for salary paid during the period Etzel's services were lost to the Government (R. 4).[1]

Respondent's answer (R. 5–7), filed March 13, 1945, denied that Etzel was a servant of the United States; denied that respondent Boone was an agent of the respondent Standard Oil Company; denied that Etzel had been injured as the result of respondents' negligence; and affirmatively pleaded that the complaint failed to state a claim upon which relief could be granted; that Etzel had been contributorily negligent; and that on March 16, 1944, Etzel had executed a general

[1] It was later stipulated between the parties that $123.25 in fact represented "the fair and reasonable value of hospital care necessarily required for John Etzel * * *" (R. 8).

release in favor of respondents, discharging them from liability for the accident.

Following a trial without jury, the district court entered findings of fact, conclusions of law (R. 27–31), and a judgment awarding damages in the amount sought by the United States (R. 32–33). In its opinion (R. 10–25) and in its findings the court held that Etzel's injuries and the consequent loss of his services as a soldier to the Government had been caused solely by respondents' negligence; that in such circumstances, and in view of the fact that the United States was obligated to pay Etzel's salary during his period of incapacitation, and to provide necessary hospital care, the Government was entitled to recover in the amount and for the items of damage alleged; and that as Etzel had sustained no loss of earnings nor had become obligated to pay any sum for hospitalization during the period of his disability, the release which he executed in favor of the respondents was ineffective to discharge their independent liability to the Government for the losses which it had suffered (R. 27–31).

On appeal (R. 33) the court below reversed (R. 40–48), holding that the existence of a right of action in the Government for the items of damage alleged was a question to be determined by reference to California law; that the government-soldier status was not one protected by

California law, since it did not fall within the master-servant category of Section 49 of the California Civil Code; and that the general release executed by Etzel barred the United States from asserting any right of subrogation or indemnification against the respondents for the hospital expenses incurred or the salary paid Etzel.'

SPECIFICATION OF ERRORS TO BE URGED

The circuit court of appeals below erred:

1. In holding that the United States may not recover from a tortfeasor the hospital expenses incurred in treating, and the salary paid to, a member of the armed forces during the period of his incapacitation due to injuries inflicted upon him by the tortfeasor.

2. In holding that the existence of such right of recovery is a question to be determined by state rather than federal law.

3. In failing to hold that under federal law such right of recovery exists.

4. In holding that a release given the tortfeasor by the injured soldier bars the United States from asserting its independent right of recovery based on loss of the soldier's services.

5. In reversing the judgment of the district court.

SUMMARY OF ARGUMENT

I. The rights of the United States in this case are governed by federal law, and are neither de-

pendent on nor governed by the provisions of the California Civil Code.

The doctrine of *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, under which a federal court sitting in diversity cases is bound to apply the law of the state in which it sits, is wholly inapplicable to situations where the rights asserted are those of the United States in the exercise of its constitutional functions, or where the rights of the parties were federally created. This limitation on the *Erie-Tompkins* doctrine, foreshadowed on the very day it was evolved (*Hinderlider* v. *La Plata Co.,* 304 U. S. 92, 110), has been adhered to ever since; this Court has consistently held that where the United States appears as a litigant, asserting a governmental right arising out of governmental activities, its rights are governed by federal law, to be fashioned by the federal courts. E. g., *Board of Commissioners* v. *United States,* 308 U. S. 343; *D'Oench Duhme & Co.* v. *Federal Deposit Ins. Corp.,* 315 U. S. 447; *Clearfield Trust Co.* v. *United States,* 318 U. S. 363; *United States* v. *Allegheny County,* 322 U. S. 174.

The relationship between the United States and its soldiers rests on the constitutional authority to "provide for the common defense," "To raise and support Armies," and "To make Rules for the Government and Regulation of the land * * * Forces." That circumstance emphasizes the error of the court below in denying recovery on the ground that the California legislature did not in-

tend to extend protection to the government-soldier relationship. If, as we believe, that relationship is such as to allow recovery here, then obviously no state legislature can abridge the right. The United States should not be subject to varying consequences from that relationship simply because the soldier marches across a state line. The government's authority in this respect cannot be subject to local controls, see *United States* v. *Allegheny County*, 322 U. S. 174, and certainly if a cause of action had been recognized prior to the enactment of the California Code, no subsequent act of the state legislature could prevent the Government from later pursuing its cause of action.

The federal law which governs the government-soldier relationship must be fashioned, as in other cases of first impression, from the materials at hand. To those we turn.

II. The right here asserted by the United States, to recover damages for the loss of services of one of its soldiers, rests upon well-settled principles of legal liability. The essential right asserted, to recover damages for injury to a status relationship which results in loss of services due by reason of that relationship, is as old as the common law itself. Bracton, *f. 115. It is the right pursuant to which the traditional common law permitted the master to recover damages for the loss of services of his apprentice or other servant, which gave the husband a right of action

when he lost the services or consortium of his wife, and which gave the parent a similar right to indemnity when he could show deprivation of the services of a child. The modern relationship of government and soldier likewise involves a status, see *In re Grimley*, 137 U. S. 147, 151–152, and its incidents are similar; we contend that it should support a similar action for loss of services resulting from a third party's tort, and for expenses of hospital care directly attributable thereto.

1. (a) The gravamen of the husband's action for interference with relationship with his wife is not only loss of services, but loss of consortium as well. When, however, the defendant is not a rival for the wife's affections, but simply injures her, by negligence or otherwise, the basis of the action is loss of services, grounded on the circumstances that the husband is entitled to the services of his wife, and is bound to maintain her. The tortfeasor who deprives him of the one and requires him to incur medical expenses in respect of the other is bound to indemnify the husband accordingly.

(b) The relationship between parent and child likewise gives rise to a status, and, where the child has been tortiously injured by a third person, the parent has an action against the tortfeasor—for loss of services. That this is the basis of the action is graphically illustrated by the cases involving seduction; the daughter herself can have no action, having consented, but her

father (or one standing *in loco parentis*) recovers for loss of her services to him. Indeed, the very circumstance that loss of services is the foundation of recovery has made the action an unsatisfactory remedy in many situations. But by the weight of American authority, the parent can recover for medical expenses incurred in treating the injured child, even apart from services, since he was bound to do so under his general duty of maintenance.

(c) Similarly, there is recovery for loss of services in the basic relationship of master and servant or master and apprentice; any tort which deprives the master of the services to which he is entitled by virtue of the relationship is actionable. The master-apprentice relation is particularly significant here since it often had its inception without the consent of the apprentice.

2. A number of modern cases deny the master the right to recover for loss of the servant's services, primarily on the ground that the modern employer-employee relation is almost wholly contractual, and thus varies from the older master and servant status of the common law. The cases on loss of services and expenses for maintenance and cure of seamen go both ways; where recovery is denied, it is on the ground that a social condition does not exist between the seaman and his employer. If, then, the bonds between a soldier and his government are relational, giving rise to

a status with incidents similar to those of statuses traditionally protected, this line of modern employer-employee cases is not authority against recovery here.

3. The nub of the present case is that the government-soldier relationship is a status (*In re Grimley*, 137 U. S. 147, 151–152), to which the law attaches reciprocal rights and obligations, a status similar to but more binding than the others. The lot of the soldier is *more onerous than* that of a child, wife, servant, or apprentice, both as to the obligations involved, and in respect of termination of the status.

The government determines who shall and who shall not become a soldier. It has complete power of discharge, and absolute power of control; the soldier is bound at his peril to obey those in authority over him, and to refrain from disrespectful behavior to his military and civil superiors. Nor can he terminate the status at will; he may not absent himself, shirk service, or desert. Yet the government can unilaterally extend his term of service indefinitely, howsoever it may have been commenced or for what period.

For its part, the government has a duty, enforceable in the courts, to pay the soldier, and that despite his incapacity; and it is bound to subsist him and to provide him with medical care.

Comparison of the foregoing incidents with those of the other relationships shows that the government-soldier status is the most binding of

all. A mere servant may leave his employer or (at least in modern times) go on strike; these actions in a soldier constitute the offenses of desertion and mutiny. An apprentice could emancipate himself by enlisting in the armed forces; a soldier who enlists in the Navy or Marine Corps commits desertion. An unhappy wife can more easily terminate her marriage than an unhappy recruit his military status. And a child may emancipate itself from parental control far more readily than a soldier can free himself from the "avuncular" (*White* v. *United States*, 270 U. S. 175, 180) tie that binds him to the government.

In short, the relationship involved here presents precisely those elements which historically gave rise to and which have continued to vitalize the loss-of-services doctrine. The holding below, that protection will not be afforded a relationship similar to but more binding than statuses historically protected simply because the formation and continuation of the modern employer-employee relationship is more consensual than formerly, is, we submit, both anomalous and untenable.

4. The circumstance that the inception of the government-soldier relationship here was nonconsensual is immaterial. A voluntary enlistment is contractual, but the status of a citizen properly drafted and that of one who has voluntarily enlisted are the same. *Selective Draft Law Cases*, 245 U. S. 366, 371; see 50 U. S. C. App. 303 (d).

The situation of the drafted soldier may involve a contract implied in law, but the gist of the matter is that the method by which the status is created is immaterial. The other statuses protected against torts which result in a loss of services are not necessarily consensual, e. g., parent-child and apprenticeship of pauper children, yet those relationships have never been denied protection on that ground.

5. Nor is there relevance in the state cases which deny an injured militiaman the right to sue as an employee or servant under the local state workmen's compensation act. Those decisions merely consider the nature of the injured soldier's statutory rights against his government. Obviously the tortfeasor's liability remains unaffected by any arrangement which the government may independently make for the benefit of its soldiers. This is strikingly illustrated by the present statutory compensation scheme for Army reserve personnel injured while on active duty. The reservist on active duty for more than thirty days receives the same benefits as do Regular military personnel (10 U. S. C. 456), while if on duty for less than thirty days he must claim in the same manner as a civilian federal employee (5 U. S. C. 797). Obviously his military status is the same, and, equally obviously, the length of his tour can have no effect on the liability of the tortfeasor who injures him.

A public servant may well be a servant for purposes of trespass *per quod servitium amisit*, and yet not entail responsibility to the public body for his acts under the rule of *respondeat superior*. The two doctrines were historically separate, and today are wholly independent. An agent may bind his principal in many situations where the principal has no right to recover from a tortfeasor for loss of the agent's services. So, too, a parent may recover for loss of services of a child in circumstances where the child's actions could not possibly make the parent liable.

6. The basic substantive error of the court below is its unwillingness to apply the loss of service doctrine to the government-soldier relationship, a relationship in every essential respect identical with the traditional master-servant status (except only that it is far more binding), simply because the master-servant status of today, in its modern aspect of employer and employee, is essentially contractual in nature.

This Court has recognized the government-soldier relationship as a status, and, Sir Henry Maine notwithstanding, "new forms of status have been constantly arising and it is the fact that the societies in which they have arisen are progressive societies that is the cause and occasion for their creation." 3 Holdsworth, *History of English Law* (3d ed. 1923) 456. The circumstance that the present case is substantially one of first im-

pression should not deter the law today any more than it deterred the law two centuries ago; indeed, a case such as this one is really a measure of the law's vitality, and of its capacity for growth.

The government's right to the services of its soldiers is a right far superior to that of the master or husband or parent to the services of servant, apprentice, wife, or child. We submit that there necessarily exists a similar right to recover damages when a tortfeasor deprives it of those services, services growing out of a relation created by law pursuant to an express grant of constitutional power.

III. The release of his own claims executed by the soldier in respondent's favor is immaterial.

1. The government's claim is an independent cause of action, collateral to and not consequent upon the soldier's claim. The master sues for loss of services, the servant for personal injuries. The servant may recover for a battery when beaten, the master only if the battery has resulted in a loss of services. *Robert Marys's Case,* 9 Co. Rep. 111b, 113a. The same is true of parents' and husbands' actions. The parent can recover where the debauched daughter cannot sue, or where the injured child has already recovered; the husband can recover for loss of services notwithstanding the failure of the wife to recover for personal injuries; and the master's action for loss of services has not up to now been barred by a recovery

by or a release from the injured servant, seaman, or soldier.

2. The same failure to recognize the distinct and separate nature of the government's cause of action for loss of services led the court below to rest its denial of recovery on the prevailing rule which denies the defendant tortfeasor the right to deduct from the damages he must pay sums previously received as compensation from employers or insurers by his victim. It may be that this rule is too generous for the injured person. But the injured servant's receiving too much is not good cause for denying the master any recovery at all for loss of services. Nor are the subrogation cases relevant; the basis of the employer's recovery there is the employee's claim for injury which the employer has theretofore paid. Here, however, the United States sues, not as the soldier's subrogee in respect of the injuries to his person, but in its own right, on account of the injury which caused it to lose his services.

3. Once the independent nature of the government's cause of action is recognized, all talk of splitting a cause of action likewise becomes irrelevant. Here there are two separate causes of action, not simply one cause of action consisting of numerous elements of recovery.

4. The measure of damages here was based on the government's out-of-pocket expenditures—pay and hospitalization—both of which it was required by law to make. Even in the parent-child cases

where there has been no recovery for services because the child was unable to render them, the parent has nonetheless recovered for medical expenses because he was bound to incur these costs as part of his duty of maintaining the child. If the soldier here had been discharged immediately after the accident, he could have recovered the expenses of hospitalization and of pay (as representing his loss of earnings) on his own account.

5. Actually, the measure of damages for loss of services was generous so far as the respondents were concerned; it was based on the view that the United States had been obliged to pay the soldier his statutory pay without receiving services in return. But that did not take into account the expense of subsisting the soldier, likewise an expenditure required by law, and likewise one which represented part of the soldier's earning power. Nor did the recovery for pay take into account the fact that the soldier might have been a trained man, the loss of whose services to the United States entailed greater damages than the loss of services of an untrained soldier in the same pay status.

ARGUMENT

The United States brought the instant action to recover the sum of $199.56, the amount that it disbursed for hospital and medical expenses and the salary which it paid to the soldier Etzel, injured as a result of the negligent operation of the respondent Standard Oil Company's truck by its

agent, respondent Boone.[2] The United States primarily rested its right to recovery on the common-law right of a master to recover for the loss of services of a servant tortiously injured by a third party. *Attorney General* v. *Valle-Jones,* [1935] 2 K. B. 209. The trial court, in a well-reasoned opinion, held that a third party who, through his tortious act, interferes with the "Government and soldier relation" to the detriment of the government, is responsible for the mischief he causes (R. 13–14).[3] It further held that the release which respondents obtained from the injured soldier was no bar to recovery by the United States, since the cause of action which the Government asserted was separate and distinct from the cause of action which had accrued to the soldier (R. 19–20). On appeal, the court below reversed, rejecting the trial court's conclusion that interference with the government-soldier relation, standing alone, was a sufficient basis for the action (R. 44). After determining that the Government could not maintain its action under California law as no master and servant relationship existed and California law did not recognize a right of recovery for an injury to the government-soldier relationship (R. 42–46), it concluded that, even had a government-soldier relation been

[2] The issue of negligence is not now contested (R. 35–36).

[3] Approved, Note (1945) 40 Ill. L. Rev. 269; cf. (1945) 59 Harv. L. Rev. 137.

sufficient to support an action for loss of services, the Government in the instant case would be barred by the general release executed in favor of respondents by the injured soldier (R. 46–48).

Our position here is that liability for the injury to the federal government-soldier relationship is governed by federal and not state law; that the federal law is, under accepted judicial techniques, to be fashioned from the materials at hand; that the government-soldier relationship is, in all of its incidents and elements, so similar to the master-servant, husband-wife, and parent-child relationships that it supports the same kind of action for loss of services which injury to those other statuses has always entailed; and that, since the government's cause of action for loss of services is one independent of any rights which the soldier may have, it is not barred by any recovery had or release executed by the injured soldier.

I

THE RIGHTS OF THE UNITED STATES IN THIS CASE ARE GOVERNED BY FEDERAL LAW, AND ARE NEITHER DEPENDENT ON NOR GOVERNED BY THE PROVISIONS OF THE CALIFORNIA CIVIL CODE

The court below held that the United States' right of recovery was governed by Section 49 of the California Civil Code (*supra;* p. 2), saying (R. 42):

> At the outset we are confronted with the problem of what law should apply. There

> is no federal statute which might afford the government a means for bringing this action and it has been held that "when the United States comes into Court to assert a claim it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter." *United States* v. *The Thekla*, 266 U. S. 328, 339, 340, and see *United States* v. *Moscow-Idaho Seed Co.*, 92 F. 2d 170, 173, 174 (C. C. A. 9). Aside from any federal legislation conferring a right of subrogation or indemnification upon the United States, it would seem that the state rules of substantive common law would govern an action brought by the United States in the role of a private litigant. *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 71, 78; *United States* v. *Moscow-Idaho Seed Co., supra*, pp. 173, 174.[1]

This holding, as we shall show, fails to give effect to decisions of this Court which have repeatedly and consistently enunciated the prin-

[1] The court below stated (R. 42) that counsel for the Government, in oral argument, in substance conceded that state law was controlling. In order to remove any misapprehension in that regard, the United States filed a motion for a rehearing, in which it set forth its position that federal and not state law was controlling and discussed at length what it conceives to be the controlling law. While the record does not set forth the petition for rehearing, we assume that counsel for respondents will concede the correctness of the foregoing facts. The court below denied the motion without opinion (R. 49), thus indicating that it did not rest its opinion upon any supposed concession by counsel.

ciple that the rights of the United States stemming out of the exertion of powers derived from the Constitution are to be determined by federal and not by state law.

1. The court below relied upon *United States* v. *The Thekla,* 266 U. S. 328. But the rule of that case is a limited one, as this Court has indicated; it is applicable only in admiralty cases where the subject matter of the claim is not the vessel libelled but the collision in which the libelled ship participates. See *United States* v. *Shaw,* 309 U. S. 495, 502–504. *United States* v. *Moscow-Idaho Seed Co.,* 92 F. 2d 170 (C. C. A. 9), also relied on by the court below, antedates the *Shaw* decision and simply parrots the quotation from *The Thekla.*

2. *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, is, of course, wide of the mark. That case held, overruling *Swift* v. *Tyson,* 16 Pet. 1, "with its numerous and sorry progeny," that, since a federal court in diversity of citizenship cases was a court of the state in which it sat (*Guaranty Trust Co.* v. *York,* 326 U. S. 99, 108–109; *Angel* v. *Bullington,* No. 31, this Term, decided February 17, 1947) it was bound to apply the law of that state and was not free to fashion "general" law. The rule of *Erie R. Co.* v. *Tompkins* was soon held broad enough to include within the orbit of state law state doctrines of equity (*Ruhlin* v. *N. Y. Life Ins. Co.,* 304 U. S. 202), state rules of the conflict of laws (*Klaxon Co.* v. *Stentor Co.,* 313 U. S. 487), and more recently, to cover state rules

as to equitable remedies (*Guaranty Trust Co.* v. *York*, 326 U. S. 99) and state notions of *res judicata* (*Angel* v. *Bullington*, *supra*). The rationale of all the foregoing cases is that neither the accident of a litigant's citizenship, nor of the state of its incorporation, nor of the court in which his or its claim is first presented, shall operate to change the rules of law governing the substantive rights of the parties.

3. But that doctrine is wholly inapplicable to situations where the rights asserted are those of the United States in the exercise of its Constitutional functions, or, indeed, where the rights of the parties were federally created or depend upon exertions of federal power. And this has been recognized at all times, contemporaneously with the development of the *Erie-Tompkins* doctrine. It is significant that, on the very day that *Erie R. Co.* v. *Tompkins* was decided, this Court, speaking through the same judge who delivered the opinion in that case, held in *Hinderlider* v. *La Plata Co.*, 304 U. S. 92, a decision involving an interstate compact, that (304 U. S. at 110) "whether the water of an interstate stream must be apportioned between the two States is a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive."

The boundary limits of *Erie R. Co.* v. *Tompkins*, thus foreshadowed on the day it was decided, have been adhered to ever since; and numerous cases

have expressly held that, when the United States appears as a litigant, asserting a governmental right arising out of governmental activities, its rights are governed by federal law, to be fashioned by the federal courts. In those circumstances the *Erie-Tompkins* rule, the purpose of which is to insure that State causes be governed by State law regardless of the particular forum in which the litigation takes place, is both inapplicable and irrelevant. *Board of Commissioners* v. *United States*, 308 U. S. 343; *Deitrick v. Greaney*, 309 U. S. 190; *Royal Indemnity Co.* v. *United States*, 313 U. S. 289; *D'Oench Duhme & Co.* v. *Federal Deposit Ins. Corp.*, 315 U. S. 447; *Clearfield Trust Co.* v. *United States*, 318 U. S. 363; *United States* v. *Allegheny County*, 322 U. S. 174; *Holmberg* v. *Armbrecht*, 327 U. S. 392.

The controlling element in these cases was that each of them involved an exercise of federal power which had its ultimate origin in the Constitution. (It is, of course, settled beyond dispute that the United States in the performance of its constitutional functions can only act in a governmental capacity. *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466, 477; *Pittman* v. *Home Owners' Loan Corp.*, 308 U. S. 21, 32.)

Thus, in *Board of Commissioners* v. *United States*, 308 U. S. 343, and in *Royal Indemnity Co.* v. *United States*, 313 U. S. 289, the question was whether interest was allowable. In the first case the principal sum represented a tax refund owing

to an Indian ward, in the second it was the amount due on a bond theretofore given the United States to secure the payment of taxes. In each case this Court held that the appropriate measure of damages for delayed payment of the sum due was to be determined by the federal courts according to their own criteria. Similarly, federal rather than state law was applied to determine the legal consequences of acts condemned by the National Bank Act (*Deitrick* v. *Greaney*, 309 U. S. 190), to ascertain the liability of the maker of accommodation paper to a federal corporation insuring the holder's deposits (*D'Oench Duhme & Co.* v. *Federal Deposit Ins. Corp.*, 315 U. S. 447), to decide the extent of the obligation of the guarantor of a forged endorsement on a check drawn by the United States (*Clearfield Trust Co.* v. *United States*, 318 U. S. 363); and to determine whether particular heavy machinery was the property of the United States or of a private contractor to which the United States had made it available for war purposes (*United States* v. *Allegheny County*, 322 U. S. 174).

The reason for the distinction between the two lines of cases is graphically presented within a narrow compass by two very recent decisions, both of which involved actions brought on the equity side of a federal district court. In one, the right sued upon was state-created; it was held barred by a state statute of limitations because

it would have been so barred had it been brought in a state court. *Guaranty Trust Co.* v. *York*, 326 U. S. 99. In the other, the right asserted was federally created, and accordingly the state statute of limitations was held not to be controlling. *Holmberg* v. *Ambrecht*, 327 U. S. 392. This Court said in the case last cited (pp. 394, 395):

> * * * The considerations that urge adjudication by the same law in all courts within a State when enforcing a right created by that State are hardly relevant for determining the rules which bar enforcement of an equitable right created not by a State legislature but by Congress. * * *
>
> The present case concerns not only a federally-created right but a federal right for which the sole remedy is in equity. *Wheeler* v. *Greene*, 280 U. S. 49; *Christopher* v. *Brusselback*, 302 U. S. 500; *Russell* v. *Todd*, 309 U. S. 280, 285. And so we have the reverse of the situation in *Guaranty Trust Co.* v. *York*, *supra*. We do not have the duty of a federal court, sitting as it were as a court of a State, to approximate as closely as may be State law in order to vindicate without discrimination a right derived solely from a State. We have the duty of federal courts, sitting as national courts throughout the country, to apply their own principles in enforcing an equitable right created by Congress. * * *

It is perfectly clear, therefore, that the learning of *Erie R. Co. v. Tompkins*, 304 U. S. 64, 78, that "There is no federal general common law," applies to diversity cases and not to situations where the United States is a litigant in connection with the assertion or exercise of governmental rights or functions. If state law were to be applied in cases such as this one, there would be presented the anomaly of federal courts declaring the state law as applied to facts which, since they involve the United States as a party, would probably never be presented to any state court for a decision. The truth of the matter is that in the field of federal activity, there still is a federal common law—though obviously it is not a federal *general* common law.

3. What is involved here is the relationship between the United States and its soldiers. The position of the United States in that connection rests on the constitutional authority to "provide for the common defence," "To raise and support Armies," and "To make Rules for the Government and Regulation of the land * * * Forces." These circumstances underscore and emphasize the error of the court below in denying recovery on the ground that the California legislature did not intend to extend protection to the government-soldier relationship (R. 43–45).

We need not here consider the divergent cases which deal with the problem of the militiaman's

status, and which consider whether he is an "employee" within the meaning of a local Workmen's Compensation Act.[6] Those cases rest at least in part on the relationship between that statute and the local military code, and perhaps reflect the unique constitutional position of state forces under the militia clause.[7] In any event, as we point out below, pp. 54–56, they are analytically irrelevant to a consideration of the tortfeasor's liability to the Government. Moreover, the significant point here is that the relationship sought to be protected in the present case is a purely federal one. If, as we believe, this relationship is such that recovery can be had, then obviously no state legislature can abridge the right. We think it equally clear that, in enforcing the rights growing out of the government-soldier relationship, the United States

[6] The following cases hold that a member of the state militia is within the coverage of the state compensation act. *Baker* v. *State*, 200 N. C. 252; *Globe Indemnity Co.* v. *Forrest*, 165 Va. 267; *State* v. *Industrial Comm.*, 186 Wis. 1; see *Andrews* v. *State*, 53 Ariz. 475 (*semble*, but very unclear). *Contra: Hays* v. *Illinois Terminal Transp. Co.*, 363 Ill. 397; *Goldstein* v. *State*, 281 N. Y. 396; *Lind* v. *Nebraska National Guard*, 144 Neb. 592 (alternative holding). Compare *Rector* v. *Cherry Valley Timber Co.*, 115 Wash. 31, holding a soldier in the United States Army, not a militiaman, to be an employee within the state compensation act.

[7] E. g., *Hays* v. *Illinois Terminal Transp. Co.*, 363 Ill. 397; *Goldstein* v. *State*, 281 N. Y. 396.

[7] See, for some recent discussions, Wiener, *The Militia Clause of the Constitution* (1940) 54 Harv. L. Rev. 181; Conway, *A State's Power of Defense under the Constitution* (1942) 11 Fordham L. Rev. 169; Colby and Glass, *The Legal Status of the National Guard* (1943) 29 Va. L. Rev. 839.

can not be subjected to the vagaries of divergent state statutes and decisions. Congress could undoubtedly so subject it by affirmative action, see *Reconstruction Finance Corp.* v. *Beaver County*, 328 U. S. 204, but in the absence of such action the relation between the Government and one of its soldiers is not one which evokes varying consequences simply because the soldier marches across a state line. Here "the desirability of a uniform rule is plain." *Clearfield Trust Co.* v. *United States*, 318 U. S. 363, 367.

In this respect, the instant case falls within the rule of *United States* v. *Allegheny County*, 322 U. S. 174, where it was held that the Government's procurement policies, evolved pursuant to the federal power to raise armies, could not be defeated or limited by state law, and, further, that the purpose of the supremacy clause was to avoid the disparities, confusions, and conflicts which would follow if the Government's general authority were subject to local controls. The nature of the relationship between the Government and soldier, and the rights arising in the Government therefrom, are equally immune from state control. In short, had it been authoritatively determined that the United States had a cause of action against one who tortiously injured one of its soldiers, prior to the enactment of the California Code, no subsequent act of the state legislature could prevent the Government from asserting its right of action in the federal courts.

United States v. *Allegheny County*, 322 U. S. 174, 183, and cases there cited.

4. The government-soldier relationship, then, is governed by federal law, law which in this as in similar cases of first impression must be fashioned from the materials at hand. See *Board of Commissioners* v. *United States*, 308 U. S. 343; *Royal Indemnity Co.* v. *United States*, 313 U. S. 289; *Clearfield Trust Co.* v. *United States*, 318 U. S. 363, 367. To those we turn.

II

THE RELATIONSHIP BETWEEN THE UNITED STATES AND ITS SOLDIERS SUPPORTS AN ACTION FOR LOSS OF SERVICES BY THE UNITED STATES AGAINST THIRD PERSONS WHO HAVE TORTIOUSLY INJURED A SOLDIER

The right here asserted by the United States to recover damages for the loss of services of one of its soldiers, rests upon well-settled common-law principles of legal liability. *Attorney General* v. *Valle-Jones*, [1935] 2 K. B. 209. There the Crown was awarded damages for the loss of services of two aircraftsmen of the Royal Air Force tortiously injured by the act of a third party, on the strength of the common-law action for loss of services of a servant, the familiar trespass *per quod servitium amisit*; and it was held that the value of the hospitalization furnished and the wages paid the men while they were incapacitated constituted an appropriate measure of damages. In *Commonwealth* v. *Quince*, 68 Comm.,

L. R. 227, [1944] Argus L. Rep. 50, the High Court of Australia split sharply on the same issues; three of the judges held that the action could not be maintained because the Government-soldier status differed from the modern master-servant relationship, while the other two held that the action was well founded.[7] In Canada, after the Exchequer Court had held that the relation between the Crown and a member of its armed forces was not such as to support a claim against the Crown on the view that a master and servant relationship existed giving rise to the application of the doctrine of *respondeat superior*, see *McArthur* v. *The King*, [1943] 3 D. L. R. 225, the Canadian Parliament immediately amended the Exchequer Court Act to provide that "a member of the naval, military or air forces of his Majesty in right of Canada shall be deemed . . . a servant of the Crown." Canadian Statutes, 1943–1944, 7 Geo. VI, c. 25, § 1.[8] In the United States the question is virtually one of first impression.[9]

[7] Although holding that the action was not maintainable, one of the three majority judges joined the minority in holding that a recovery of hospital expenses and wages would be proper, assuming the relationship was one protected at common law. See 68 Comm. L. R. at 247. See *infra*, pp. 72–75.

[8] Thereafter the Appeal Division of the Supreme Court of New Brunswick held that the Act as amended applied only to the Exchequer Court and did not govern an action at common law. *Attorney-General of Canada* v. *Jackson*, [1945] 2 D. L. R. 438.

[9] In *United States* v. *Atlantic Coast Line R. Co.*, 64 F. Supp. 289 (E. D. N. Y.), recovery was denied; the action was

But, while the case may be a novel one on its facts, the essential right asserted is as old as the common law itself. It is the right to recover damages for injury to a status relationship which results in loss of services due by reason of that relationship. It is a right that was recognized by the earliest medieval commentators (Bracton, *f. 115; Britton (Nichols' tr., 1901 ed.) 109), a right which in the traditional common law permitted the master to recover damages for the loss of services of his apprentice or other servant, and which gave the husband a right of action when he lost the services or consortium of his wife, and the parent a similar right to indemnity when he could show deprivation of the services of a child. That same right is the foundation of the modern doctrine which stems from *Lumley* v. *Gye*, 2 E. & B. 216.[11] The question here is whether the modern relationship of government and soldier will

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one for loss of services of a soldier who died shortly after being injured. Recovery was similarly denied in *United States* v. *Klein*, 153 F. 2d 55 (C. C. A. 8), an action to recover the wages and cost of medical treatment furnished an injured Civilian Conservation Corps enrollee, on the ground that the United States Employees' Compensation Act provided the United States a means of recoupment—a method not here available.

[11] "It is pretty clear also that the famous decision in *Lumley* v. *Gye* to the effect that a persuasion to break any contract without just cause or excuse is actionable, is traceable historically to the firmness with which the judges have maintained the idea that the master has something in the nature of a real right to his servant's services." 3 Holdsworth, *History of English Law* (3d ed. 1923) 677.

support a similar action for loss of services resulting from a third party's tort, and for expenses of hospital care directly attributable thereto.

We contend that it will. We point out below the scope of the well-recognized common law action for loss of services, and show that its basis is injury to a status which gave the dominant party thereto a right to the services of and a duty to care for the servient party. We show that the cases which deny recovery in situations arising out of the modern employer and employee relationship do so because the latter relationship is held not to involve a status. We then examine the situation of the modern soldier with respect to the government's rights to his services and its duty to pay him and to provide him with medical care. We find that, as this Court has held, the government-soldier relationship creates a status, see *In re Grimley*, 137 U. S. 147, 151–152, and we point out that the incidents of the status are the same regardless of the method by which the status is created. The volunteer, who becomes a soldier through a contract of enlistment, stands on a footing identical with that of the man who has been drafted or conscripted by compulsion of law. We conclude that when, as here, a soldier has been incapacitated through the tortious act of a third party, the government is entitled to be indemnified by the tortfeasor for its loss of services, measured by the injured soldier's statutory pay,

and for the expenses of the hospital care which was a proximate consequence of the injury.

1. We shall not undertake to retrace here the gradual development of the common law doctrines governing liability for torts which cause injury to status relationships; that path has several times been illuminated by historians of recognized authority and competence. See 8 Holdsworth, *History of English Law* (1926) 427–430; 1 Street, *Foundations of Legal Liability* (1906) 263–272; Pollock, *The Law of Torts* (12th ed. 1923) 224–235; Winfield, *A Text-Book of the Law of Tort* (1937) 244–255, 619–623; Wigmore, *Interference with Social Relations* (1887) 21 Am. L. Rev. 764; Green, *Relational Interests* (1934) 29 Ill. L. Rev. 460, (1935) 29 *id.* 1041. More important in the present connection is the recognized scope of that liability in its present development.

(a) Interference with the relationship between husband and wife has long occasioned liability, whether that interference be by violence (*Guy* v. *Livesey*, Cro. Jac. 501) or by enticement (*Winsmore* v. *Greenbank*, Willes 577). There the gravamen of the action is not only loss of services, but loss of consortium as well, and in that aspect the action has survived notwithstanding the gradual and progressive emancipation of married women. See *Place* v. *Searle*, [1932] 2 K. B. 497. Indeed, in England a wife is now allowed an action against a woman who has enticed away her husband. *Gray* v. *Gee*, 39 T. L. R. 429.

Where the defendant's act involves enticing away the plaintiff's wife, or alienating her affections, or engaging in misconduct with her, the plaintiff stresses loss of consortium. E. g., *Boland* v. *Stanley*, 88 Ark. 562; *Bedan* v. *Turney*, 99 Cal. 649; *Mutter* v. *Knibbs*, 193 Mass. 55. *Powell* v. *Benthall*, 136 N. C. 145. But where the defendant is not a rival for the wife's affections, but has injured her, as for example by supplying her with drugs (*Holleman* v. *Harward*, 119 N. C. 150), or, more usually, through negligence, then the plaintiff recovers for the loss of his wife's services. E. g., *Little Rock Gas & Fuel Co.* v. *Coppedge*, 116 Ark. 334; see 1 Schouler, *Domestic Relations* (6th ed. 1921) § 677; Restatement of Torts, § 693. The basis for recovery is the circumstance that the husband, by reason of the marriage relationship, is entitled to the consortium and services of his wife; that he is bound to provide medical care for his wife in the event of her illness or incapacity; and that, when the wife is injured through the tortious act of a third party, the tortfeasor is bound to indemnify the husband for loss of services, loss of consortium, and expenses of medical care.

(b) The relationship between parent and child likewise gives rise to a status, and where the child has been tortiously injured by the act of a third person, the parent has an action against the tort-

feasor—for loss of the child's services. That action is independent of any remedy available to the child, as is graphically illustrated by the father's right to recover damages consequent upon the seduction of a daughter. The daughter has no remedy, because she consented (*Paul* v. *Frazier*, 3 Mass. 71); the action belongs to the father, not because of the disgrace or the debauching of his child (cf, *Eager* v. *Grimwood*, 1 Ex. 61; see *Hornketh* v. *Barr*, 8 Serg. & R. (Pa.) 36, 39) but because the defendant, by getting her with child, deprived the father of her services. E. g., *Barbour* v. *Stephenson*, 32 Fed. 66 (C. C. D. Ky); *Coon* v. *Moffitt*, 2 Pen. (N. J.) 583; *Hewit* v. *Prime*, 21 Wend. (N. Y.) 79; *Lipe* v. *Eisenlerd*, 32 N. Y. 229; *Lawyer* v. *Fritcher*, 130 N. Y. 239; *Pickle* v. *Page*, 252 N. Y. 474; *Evans* v. *Walton*, L. R. 2 C. P. 615. Where the child has been injured through negligence or other tort, the parent's recovery is similarly predicated upon a loss of services. *Louisville & N. R. R. Co.* v. *Willis*, 83 Ky. 57; *Kenney* v. *Baltimore & O. R. Co.*, 101 Md. 490; *Franklin* v. *Butcher*, 144 Mo. App. 660; *Callaghan* v. *Lake Hopatcong Ice Co.*, 69 N. J. L. 100; *Whitney* v. *Hitchcock*, 4 Denio (N. Y.) 461; *White* v. *Nellis*, 31 N. Y. 405; *Tidd* v. *Skinner*, 225 N. Y. 422; *Berringer* v. *Great Eastern Ry. Co.*, L. R. 4 C. P. D. 163. See also Restatement of Torts, § 703.

The very circumstance that recovery was allowed only for loss of services made the remedy an unsatisfactory one. Thus, where the child was of

such tender years as to be unable to render services, none would be implied from the mere relationship. *Hall* v. *Hollander*, 4 B. & C. 660; but see *Durden* v. *Barnett*, 4 Ala. 169 (suggestion that recovery could be had for loss of child's consortium); *Clark* v. *Bayer*, 32 Oh. St. 299 (basis for recovery is right to services, regardless of actual services). And where the child was not living at home, so that no services were in fact being rendered at the time when she was seduced, there could be no recovery. *Grinnell* v. *Wells*, 7 M. & G. 1033. This called forth Serjeant Manning's oft-quoted note, that "the quasi-fiction of *servitium amisit* affords protection to the rich man, whose daughter occasionally makes his tea, and leaves without redress the poor man, whose child, as here, is sent, unprotected, to earn her bread amongst strangers." 7 M. & G. at 1044. By parity of reasoning, since the recovery was for loss of services, the courts held that they were owed to the head of the household, regardless of his relationship to the child (*Peters* v. *Jones*, [1914] 2 K. B. 781; *Beetham* v. *James*, [1937] 1 K. B. 527; *Clark* v. *Bayer*, 32 Oh. St. 299 (action by grandfather having custody of the children)) and that accordingly a widow could not recover damages from one who had seduced her daughter in the father's lifetime. *Hamilton* v. *Long*, [1903] 2 Ir. R. 407, affirmed, [1905] 2 Ir. R. 552; cf. *Buhler* v. *Cohn*, 31 Ga. App. 463. But see *Coon* v. *Moffitt*, 2 Pen. (N. J.) 583, holding that the widow could sue

where the loss of services occurred and the medical expenses were incurred after the father's death.

Along with the recovery for loss of services, the parent obtains reimbursement for the medical expenses incident to the child's injury; the basis for the additional item is the father's duty of maintenance. E. g., *Netherland-American Steam Nav. Co. v. Hollander*, 59 Fed. 417 (C. C. A. 2); *Sawyer v. Sauer*, 10 Kan. 519. As the court said in the case first cited (59 Fed. at 418),

> A father whose infant child has been injured by the tort or negligence of a third person has a right of recovery to the extent of his own loss. He cannot recover for the immediate injury to the child. His action rests upon his right to the child's services, and upon his duty of maintenance. When he is deprived of the right, or put to extra expense in fulfilling the duty, in reason and justice he ought to be permitted to have recourse to the wrongdoer for indemnity.

The cogent expression of the Kansas court in *Sawyer v. Sauer* is to the same effect (10 Kan. at 522–523):

> The father is under obligations to support his minor children, and [is] entitled to receive the benefits of their labor. If the injury increases the expense of the one, or lessens the value of the other, he suffers loss, and to this extent has a legal claim for reimbursement. The mere fact that one pays

> the surgeon's bills of a party injured gives no right of recovery, for it may be only a voluntary payment * * *. But where the party paying is, by virtue of the relations subsisting between him and the party injured, bound to pay such bills, any act of a third party which creates a necessity for such bills casts a legal liability upon him.

Indeed, the American cases generally allow recovery for necessary medical expenses even when the child is of such tender years as to be incapable of rendering services. *Durden* v. *Barnett*, 7 Ala. 169; *Sykes* v. *Lawlor*, 49 Cal. 236; *Dennis* v. *Clark*, 2 Cush. (Mass.) 347; *Cuming* v. *Brooklyn City R. R. Co.*, 109 N. Y. 95; see *Hall* v. *Hollander*, 4 B. & C. 660, 662 (*semble, per* Bayley J.).

(c) Similarly there is recovery for loss of services in the basic relationship of master and servant or master and apprentice; any tort which deprives the master of the services to which he is entitled by virtue of the relationship is actionable. E. g., *Woodward* v. *Washburn*, 3 Denio (N. Y.) 369 (false imprisonment); *Ames* v. *Union Ry. Co.*, 117 Mass. 541 (negligence); *Hodsoll* v. *Stallebrass*, 11 A. & E. 301 (maintenance of a nuisance).[12]

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[12] See also 1 Bl. Comm. *429; 3 Bl. Comm. *142; *Jones* v. *Waterman S. S. Corp.*, 155 F. 2d 992 (C. C. A. 3); *Paramount Productions Corp.* v. *Herbert M. Baruch Corp.*, 135 Cal. App. 351; *Cain* v. *Voltmer*, 19 Idaho 163; *Development Co.* v. *Chidester*, 86 W. Va. 561; *Martinez* v. *Gerber*, 3 M. & G. 88; *Cox* v. *Muncey*, 6 C. B. (N. S.) 375; *Bradford Corporation* v. *Webster*, [1920] 2 K. B. 135.

Particularly significant in the present connection is the master-apprentice relationship, which often originated in consequence of statutory provisions and without the consent of the apprentice (1 Bl. Comm. *426; 2 Kent, *Commentaries* (Holmes' 12th ed.) *263; see *Johnson* v. *Dodd*, 56 N. Y. 76), and which could not be readily terminated prior to the expiration of the period fixed in the indenture. See *Cox* v. *Muncey*, 6 C. B. (N. S.) 375, 385. Recovery was allowed whenever the defendant's negligence injured one apprenticed to a plaintiff when that injury deprived the latter of the apprentice's service. We shall consider more at length below, pp. 50–51, the observation of Lord Ellenborough that a soldier is as much bound to the service of the King as an apprentice to that of his master. See *The King* v. *Inhabitants of Norton*, 9 East 206, 210.

2. A number of recent cases deny the master any right to recover from a tortfeasor for loss of the servant's services, primarily on the ground that the modern relationship of employer and employee is almost wholly contractual, and thus is quite different from the master and servant status with which the older common law was familiar. *Chelsea Moving &c. Co.* v. *Ross Towboat Co.*, 280 Mass. 282; *Philadelphia* v. *Philadelphia Rapid Transit Co.*, 337 Pa. 1; cf. *The Federal No. 2*, 21 F. 2d 313 (C. C. A. 2). The court below seems to have rested its ruling at least in part on this

ground (R. 42–43, 45–46). But we think that the rationale of the cases cited serves only to emphasize the right of recovery for loss of services attributable to injuries to the government-soldier relationship.

The starting point of the cases cited is the frequently quoted remark of Mr. Justice Holmes that "as a general rule, at least, a tort to the person or property of one man does not make the tortfeasor liable to another merely because the injured person was under a contract with that other, unknown to the doer of the wrong." *Robins Dry Dock & Repair Co.* v. *Flint*, 275 U. S. 303, 309. See *Agwilines, Inc.* v. *Eagle Oil & Shipping Co.*, 153 F. 2d 869 (C. C. A. 2), certiorari denied, 328 U. S. 835; *Chelsea Moving &c. Co.* v. *Ross Towboat Co.*, 280 Mass. at 286–287 and cases there cited.[13] The next step is to distinguish the "relation of master and apprentice"

[13] Some of those cases are relied on by the respondent here (Br. Opp. 27–28). Thus, in *Brink* v. *Wabash Ry. Co.*, 160 Mo. 87, the parents of a son who was killed as a result of defendant's negligence, and who in his lifetime had contracted to support them, were held not entitled to recover for the loss arising out of non-performance of the contract. In *Connecticut Mut. L. Ins. Co.* v. *New York & N. H. R. R. Co.*, 25 Conn. 265, an insurer was held to have no cause of action against one who, by causing the death of an insured, had obligated the insurer to make payment under the policy. Similarly, in *Byrd* v. *English*, 117 Ga. 191, a printer was not permitted to recover from a contractor who negligently injuring the power lines through which the plaintiff was supplied with

cases, such as *Ames* v. *Union Ry. Co.*, 117 Mass. 541, on the ground that (280 Mass. at 285)—

> The status of apprentice included frequently, if not always, the equivalent of membership in the family of the master. In aspects of nurture and training and education either in a trade or in the schools the relationship bears resemblance to that of parent and child. The right of action in the *Ames* case is strongly akin to that long recognized by the law by the parent for consequential damages from injury to his minor child, including loss of service during the nonage.

Finally, while recognizing that "Some cases of actions by a master to recover damages founded on contract with his servant injured by the tort of the defendant have a contrary tendency", for which see the authorities cited *supra*, p. 37, Rugg, C. J., for the court concluded that they "chiefly arose many years ago when the law of master and servant was comparatively undeveloped." 280 Mass. at 287.

In other words, recovery is denied because the modern relationship of employer and employee

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electricity pursuant to contract, had deprived the latter's printing establishment of light and power.

See, however, *Boston Woven Hose & Rubber Co.* v. *Kendall*, 178 Mass. 232, where the Massachusetts court, *per* Holmes, C. J., permitted an employer to recover, in a suit against the manufacturer of a defective article, damages which the employer had previously paid to his employees who were injured by reason of the defect.

is essentially contractual, and does not create a status. Similiarly, in *Philadelphia* v. *Philadelphia Rapid Transit Co.*, 337 Pa. 1, recovery on the basis of loss of services under the common law doctrine was denied, the court saying (337 Pa. at 5): "It is extremely doubtful whether such a right of action should be recognized under modern conditions. It had its beginnings at a time when the relation of master and servant was totally different from that of today," citing the *Chelsea Moving Co.* case.[14]

The situation of the seaman, whose position approximates more closely to that of the traditional common law servant, and who even today cannot exercise all of the privileges accorded non-maritime workmen (cf. *Southern Steamship Co.* v. *Labor Board*, 316 U. S. 31), has evoked a difference of judicial opinion. In the frequently cited case of *The Federal No. 2*, 21 F. 2d 313 (C. C. A. 2), it was held that an employer who was required to pay the hospital expenses of his seaman employee, injured by negligence, was not entitled to obtain reimbursement for his expenditures from the tortfeasor. Judge Manton distinguished the parent-child and husband-wife cases on the ground that (21 F. 2d at 314)—

> This social condition does not exist in the relationship of a seaman and his em-

[14] We consider below, p. 72, the further objection to recovery based on the policy against splitting of causes of action. 337 Pa. at 4–5.

> ployer. It is a contract obligation, which he must perform, that imposes this responsibility, even though it be a special damage he suffers from a tortious act. The cause of the responsibility is the contract; the tort is the remote occasion.

As in the cases just discussed the *ratio decidendi* is the absence of status.[15]

More recently, however, under the influence of this Court's decision in *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, the Third Circuit in *Jones* v. *Waterman S. S. Corp.*, 155 F. 2d 992, allowed recovery in a similar situation. It said (155 F. 2d at 1000–1001):

> In *Seas Shipping Co., Inc.* v. *Sieracki*, Mr. Justice Rutledge makes it plain that the obligations of the ship to its seamen do not rest solely in contract; that a seaman is in effect a ward of the admiralty and that the relationship between owner and seaman, master and seaman, and ship and seaman is in essence a "consensual relationship". We are of the opinion that the relationship of the ship owner to the seaman is more closely analogous to that of father and child than to that of an employer to a mere employee. We prefer to impose a higher degree of dignity upon the ship-seaman relationship, awarding to it a status or a "social condition" in excess of

[15] Judges Swan and A. N. Hand concurred in the result only.

that given under the ruling in *The Federal No. 2*.

Accordingly, Jones being an employee of Waterman and having been injured through the negligence of Reading, Waterman was held entitled to recover from Reading for loss of Jones' services and for any sums which it was obliged to expend for Jones' maintenance and cure.[16]

We need not pause to determine whether the Second Circuit or the Third have more accurately analyzed the position of the seaman. The decisive point here is that recovery by the employer for loss of services is denied only where his connection with the employee is held to be contractual only, where it is held to be not relational, where no status exists. Accordingly, we proceed to analyze the position of the soldier *vis-à-vis* the government, for certainly, if that relation gives rise to a status, the cases discussed at pages 38–42 of this brief are not authority against recovery here.

3. The nub of the present case is that the government-soldier relationship is a status, to which the law attaches reciprocal rights and obligations. This status is similar to but more binding than the other domestic relationships, in that the lot of the soldier is more onerous than that of a child, wife, servant or apprentice, both as to the obligations involved and in respect of the means whereby he

[16] The court relied in part (155 F. 2d at 1001) on the opinion of the district court in the present case.

can terminate the status. We think it necessarily follows that for tortious interference with that status, resulting in loss of the soldier's services, there is the same liability on the tortfeasor as for interference with any of the other statuses.

That the soldier-government relationship amounts to a status is clear both on authority and analysis. This Court said in *In re Grimley*, 137 U. S. 147, dealing with one who became a soldier by voluntary enlistment (pp. 151–152):

> * * * Enlistment is a contract; but it is one of those contracts which changes the status; and, where that is changed, no breach of the contract destroys the new status or relieves from the obligations which its existence imposes. Marriage is a contract; but it is one which creates a status. Its contract obligations are mutual faithfulness; but a breach of those obligations does not destroy the status or change the relation of the parties to each other. * * *
>
> By enlistment the citizen becomes a soldier. His relations to the State and the public are changed. He acquires a new status, with correlative rights and duties; and although he may violate his contract obligations, his status as a soldier is unchanged. He cannot of his own volition throw off the garments he has once put on, nor can he, the State not objecting, renounce his relations and destroy his status on the plea that, if he had disclosed truthfully the facts, the other party, the State,

would not have entered into the new relations with him, or permitted him to change his status. * * *

Accord: United States v. Williams, 302 U. S. 46.

Analysis of the incidents of the government-soldier relationship confirms this view.

First, it is the government which determines who shall and who shall not become a soldier. Although by statute all males between the ages of eighteen and forty-five are liable for military service (Sec. 1 of the Act of April 22, 1898, c. 187, 30 Stat. 361, 10 U. S. C. 1; Section 3 (a) of the Selective Training and Service Act of 1940, as amended, 50 U. S. C. App., Supp. V, 303 (a)), only those who are acceptable to the military are inducted, in the case of men drafted (Section 3 (a) of the Selective Training and Service Act of 1940, as amended), or enlisted, in the case of voluntary applicants for enlistment (10 U. S. C. 621–627).

Second, the government has complete power of discharge. We refer here, not to dismissal or dishonorable discharge as punishment for crime or unbecoming conduct (see *Manual for Courts-Martial* (1928, corrected to 1943) c. XXIII), but to the right of the United States to discharge enlisted soldiers "for the convenience of the government" (Army Regulations 615–365, 24 January 1947), to separate supernumerary or inefficient officers of the regular establishment (*Street v. United States,* 133 U. S. 299; *Creary* v. *Weeks,*

259 U. S. 336) and to return to inactive status officers of the reserve components (*Denby* v. *Berry*, 263 U. S. 29). In none of these cases has the individual any right to be retained in the service. See also *Reid* v. *United States*, 161 Fed. 469 (S. D. N. Y.), writ of error dismissed, 211 U. S. 529; *Nordmann* v. *Woodring*, 28 F. Supp. 573 (W. D. Okla.); cf. *Patterson* v. *Lamb*, No. 229, this Term, decided January 20, 1947.

Third, the government has an absolute power of control, enforced by rigorous sanctions. As this Court has pointed out (*In re Grimley*, 137 U. S. 147, 153):

> An army is not a deliberative body. It is the executive arm. Its law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier. Vigor and efficiency on the part of the officer and confidence among the soldiers in one another are impaired if any question be left open as to their attitude to each other.

Accordingly disobedience of orders is an offense at military law. Articles of War 64 and 65; 10 U. S. C. 1536, 1537. Disobedience of the lawful order of a commissioned officer is in time of war a capital offense. AW 64. Disrespect to officers and non-commissioned officers is punishable, even though no disobedience is involved. AW 63; AW 65; 10 U. S. C. 1535, 1537. And tangible recognition is accorded the supremacy of the civil

authorities by a provision punishing contemptuous or disrespectful language spoken by military personnel concerning the President, the Congress, and certain civil officials. AW 62; 10 U. S. C. 1534.

Fourth, the soldier cannot terminate the status at will. If he absents himself from his post or station without leave, if he shirks important service or hazardous duty, or if he deserts or attempts to desert the service, he commits a military offense. AW 61, 28, 58; 10 U. S. C. 1533, 1499, 1530. In time of war, desertion is a capital offense, AW 58; see Ex. Order 9048, Feb. 3, 1942 (7 F. R. 775), and unauthorized absence can be punished by a long term of confinement. Ex. Order 9267, Nov. 9, 1942 (7 F. R. 9221); cf. Ex. Order 9683, Jan. 19, 1946 (11 F. R. 789) and Ex. Order 9772, Aug. 24, 1946 (11 F. R. 9325). And, though the soldier may have enlisted only for a short term of years, or have been drafted under a statute which limited his service to twelve months, the government can unilaterally extend his obligation to serve for as long as it desires. See Section 2 of the Joint Resolution of August 18, 1941, c. 362, 55 Stat. 626; Section 2 of the Joint Resolution of December 13, 1941, c. 571, 55 Stat. 799, 800.

But the status is not one-sided; the government has obligations also. It is bound to pay the soldier. Pay Readjustment Act of 1942, as amended; 37 U. S. C., Supp. V, 101 *et seq.* And,

in the event of nonpayment, the soldier may enforce the obligation by suit in the Court of Claims. Judicial Code, Sec. 145 (1); 28 U. S. C. 250 (1); see, e. g., *United States* v. *Dickerson*, 310 U. S. 554. The obligation to pay the soldier continues notwithstanding his injury or incapacity, except in a very limited class of cases where the injury has resulted from the soldier's own misconduct.[17] The same is true as to its obligation to subsist the soldier, except that here there are no exceptions. See 10 U. S. C. 724–726.

Finally, the government is bound to provide the soldier with hospitalization and medical care during periods of incapacitation.[18] Indeed, the

[17] Pay otherwise authorized (by the Pay Readjustment Act of 1942 as amended, 56 Stat. 359, 1037, 37 U. S. C., Supp. V, 101 *et seq.*) may only be withheld, in the absence of court-martial or certain board proceedings, during unauthorized absence from duty in excess of twenty-four hours (Par. 3a, Army Regulations 35–1420, December 15, 1939), or because of the effects of a disease attributable to the intemperate use of alcoholics or habit-forming drugs. Sec. 1 of the Act of May 17, 1926, 44 Stat. 557, 10 U. S. C. 847a; Army Regulations 35–1440, November 17, 1944.

[18] Under the broad authority of the Secretary of War to issue regulations for the hospitalization and medical care of all military personnel (see the Act of July 15, 1939, c. 282, 53 Stat. 1042, 10 U. S. C. 455e), medical attendance was authorized for all enlisted men at all times in question in this case. Par. 2b (d), Army Regulations 40–505, September 1, 1942. Substantially similar provisions are contained in Army Regulations 40–505, December 5, 1945, as changed by Changes No. 1, February 28, 1946, now in force. Under Section 3 (d) of the Selective Training and Service Act of 1940, 54 Stat. 885, 886, 50 U. S. C. App. 303 (d), inducted personnel are entitled to all benefits accorded other enlisted men.

very purpose of the Medical Department of the Army is to provide just such care—and ever since the days of the Revolution and the Continental Congress, provisions to that end have been on the books. See *Military Laws of the United States* (8th ed. 1939), pp. 62–63.

Comparison of the foregoing incidents of the government-soldier relationship with the incidents of other relationships traditionally protected against torts resulting in loss of services serves to illustrate not only that the former relationship is more durable and all-permeating than the others, but also that it contains all the elements inhering in the others. That being so, there is every reason why it should be equally protected. And see *infra*, pp. 65–66.

(a) "A servant is a person subject to the command of his master as to the manner in which he shall do his work." *Yewens* v. *Noakes*, 6 Q. B. D. 530, 532, *per* Bramwell, L. J. It is the master's power of control which is the most decisive factor in determining whether a particular individual is his servant, or that of another, or is an independent contractor. *Singer Mfg. Co.* v. *Rahn*, 132 U. S. 518; *Standard Oil Co.* v. *Anderson*, 212 U. S. 215; see *Boswell* v. *Laird*, 8 Cal. 469, 489. The other elements of the master-servant relationship are the master's right of selection and engagement of the servant; the master's duty to pay wages; the master's power of dismissal; and the master's control of the servant's

actions. See 2 Kent, *Commentaries* (Holmes' 12th ed.) *258–260; 2 *Mechem, Agency* (2d ed. 1914) § 1863; 35 American Jurisprudence, *s. v.* Master and Servant, § 3; Roberts and Wallace, *Employer's Liability* (4th ed.), p. 78; 37 L. R. A. 38. All of those elements are present in the government-soldier relationship. But, while the servant may leave his employ at will, subject to liability in damages for breach of contract, the soldier's departure from his place of duty, is, as has been shown, a military offense; and while the servant's right to combine with others in a strike in order to better his condition received increasing recognition in the Nineteenth Century (see Landis, *Cases on Labor Law* (1934) 16–26, 32–36), similar action on the part of military personnel still amounts to mutiny, a most serious military offense which is capital even in time of peace. AW 66; 10 U. S. C. 1538.

(b) The apprentice was indentured to the master for a term of years. 1 Bl. Comm. *426; 2 Kent, *Commentaries* (Holmes' 12th ed.) *261. Frequently the arrangement was not even nominally consensual, as, for instance, where poor children were apprenticed to a master by the overseers who had charge of them for the community. E. g., *Johnson* v. *Dodd*, 56 N. Y. 76. Because the relationship was one of tutelage, it was long ago remarked that a soldier is as much bound to the service of the King as an apprentice to his master. *The King* v. *Inhabitants of Norton*, 9 East 206,

210 (1808), *per* Lord Ellenborough. Yet an apprentice could emancipate himself from his master by enlisting in the army, *Johnson* v. *Dodd*, 56 N. Y. 76, while a soldier can not remove himself from army control by enlisting in the Navy or in the Marine Corps or in another unit of the Army. Quite the contrary; the second enlistment amounts to desertion. AW 28; 10 U. S. C. 1499.

(*c*) Certain similarities between the status created by the contract of enlistment and the status created by the marriage contract are adverted to by the Court in *In re Grimley*, 137 U. S. 147, 151–152. Perhaps it is only necessary to add that the government's control over the soldier is somewhat more substantial than that of the husband over the wife, even as of the palmy days when "husband and wife were one and the husband was that one"; and that the marriage contract is under modern statutory provisions more easily rescinded and dissolved than is the contract of enlistment. After all, not even the unhappiest recruit can revert to civilian status on a showing of incompatibility or mental cruelty.

(d) Just as the apprentice can free himself from his master's control by enlistment, so also can a minor entering the military service emancipate himself from the control of his father. *United States* v. *Williams*, 302 U. S. 46, 49; *In re Morrissey*, 137 U. S. 157, 159–160; *In re Miller*, 114 Fed. 838, 842–843 (C. C. A. 5); *United States* v. *Reaves*, 126 Fed. 127, 130 (C. C. A. 5); *The King* v. *Inhabitants of Rotherfield Greys*, 1 B. &

C. 345. Here again, a similar dissolution of status is denied the soldier. But there are still similarities between the parent-child relationship and the government-soldier relationship. In each there is an obligation of service and obedience on one hand and a duty of support and maintenance on the other. Significantly enough, this Court has observed that the relation of the Government to its soldiers "if not paternal was at least avuncular." *White* v. *United States*, 270 U. S. 175, 180.

Thus it is clear that the relationship involved in the instant case presents precisely those elements which historically gave rise to and which have continued to vitalize the doctrine that a master, husband, or parent may recover for the loss of services of his servant, apprentice, wife, or child. As we have pointed out, even if the position of the government *vis-à-vis* the members of its armed forces is not precisely one *in loco parentis*, it is clear that its right to their services is more firmly-established, more far-reaching, and more protected by drastic sanctions, than was the master's when the doctrine took shape. To hold, as did the court below, that no recovery can be had in the instant case because the government-soldier relationship is less consensual than the modern employer-employee relationship (R. 43-46) is to ignore not only the solid doctrinal common law foundation upon which the instant action is rested, but to ignore also that through all the decisions over the last seven centuries which have

established and strengthened the loss of service doctrine runs the common core of policy of protecting the interest which one party has in the obligation of service of another. Cf. *Syas Shipping Co.* v. *Sieracki*, 328 U. S. 85; Holdsworth, *supra*, p. 30, note 11. The conclusion of the court below, that protection will not be afforded a relationship closely approximating statuses historically covered simply because the formation and continuation of the modern employer-employee relationship is more consensual now than formerly, is, we submit, anomalous and untenable.

4. We do not regard it as material that the inception of the government-soldier relationship in the present case was non-consensual, Etzel having been drafted. It is true that a voluntary enlistment in the Army is contractual (*In re Grimley*, 137 U. S. 147, 151; *In re Morrissey*, 137 U. S. 157, 159; *United States* v. *Williams*, 302 U. S. 46, 49), and that "the status of a citizen properly drafted and that of one who has voluntarily enlisted are the same" (*Selective Draft Law Cases*, 245 U. S. 366, 371). Section 3 (d) of the Selective Training and Service Act of 1940 (50 U. S. C. App. 303 (d)) specifically declares ~~that drafted~~ men are entitled to the same pay and benefits as men voluntarily enlisted. The situation of the drafted soldier could no doubt be brought within the rubric of contract by calling it a contract implied in law. But the gist of the matter is that, as this Court has pointed out, the relationship creates a status,

and it is really quite immaterial how the status is created. Its incidents remain the same, and it is equally entitled to protection, whether the soldier enlists or whether he is drafted.

The other statuses protected against a tortious interference that results in a loss of services are not necessarily created by contract or even by mutual consent. Marriage is; the master-servant relationship generally is; apprenticeship in the case of pauper children was created quite without a consensual act. See *Johnson* v. *Dodd*, 56 N. Y. 76. And, while the parent-child relationship may be consensual *vis-à-vis* the parent when it arises by adoption, certainly it never is so far as the child is concerned. Yet no one has ever suggested that, when the child is injured, the parent's recovery for loss of services is to be denied because his relationship to the child was not contractual. None the less, the court below denied recovery to the United States for the loss of services of its soldier on substantially that ground (R. 46).

5. Equally untenable is the reliance of the circuit court of appeals on state militia cases which deny an injured militiaman the right to sue under the local workmen's compensation act. See *Hays* v. *Illinois Terminal Transp. Co.*, 363 Ill. 397; *Goldstein* v. *State*, 281 N. Y. 396; *Lind* v. *Nebraska National Guard*, 144 Neb. 122, all cited at R. 45. For the first two decisions both rest on the ground that under the applicable state statutes the injured militiaman's remedy must be

sought under the state's military code, not under its workmen's compensation law, and the third case, though adopting the results reached by the others, rests at least alternatively on the ground that the militiaman's claim was filed out of time.

Obviously such cases, even on the assumption that they were rightly decided, are not dispositive of the present controversy. We are concerned here with the government's right to recover from a tortfeasor, who has injured a soldier, damages for the loss of that soldier's services; those cases merely consider the nature of the injured soldier's statutory rights against the government. The tortfeasor's liability obviously remains unaffected by any arrangements made by the government for the benefit of its soldiers.

The irrelevance of the militia cases (and see also the authorities cited *supra*, p. 26, note 5), becomes even more clear when we consider the present statutory compensation scheme for Army reserve personnel injured while on active duty. If the reserve officer or soldier is injured while on active duty for more than thirty days, he is entitled to the same pensions, compensation, retirement pay, and hospital benefits as are available for officers and enlisted men of the Regular Army of corresponding grades and length of service. Section 5 of the Act of April 3, 1939, c. 35, 53 Stat. 555, 557, as amended; 10 U. S. C. 456. If, however, the reservist's tour of active duty, in time of peace, is for less than thirty

days, then he is entitled only to such benefits as are accorded civil employees under the United States Employees' Compensation Act. Act of July 15, 1939, c. 284, 53 Stat. 1042; 5 U. S. C. 797." Obviously, the military status of the reserve officer or soldier on active duty, *vis-à-vis* the government, is not varied by the length of his tour; and, equally obviously, that factor cannot have the slightest effect on the liability, *vis-à-vis* the government, of a tortfeasor who injures the reservist.

In this connection, also, it is necessary to bear in mind that, while injury to a public servant by a tortfeasor may entail liability under the familiar doctrine of trespass *per quod servitium amisit*, there may still be reasons of policy why torts by the public servant should not make the public body liable under the rule of *respondeat superior*. Thus, in *Bradford Corporation* v. *Webster*, [1920] 2 K. B. 135, the municipality was permitted to recover for loss of services against one who had injured one of its constables, while in *Fisher* v. *Oldham Corporation*, [1930] 2 K. B. 364, one injured by the tort of a police officer was denied recovery against the municipality. This may account, we believe, for the decision of the Canadian Exchequer Court in *McArthur* v. *The King*, [1943] 3 D. L. R. 225, which was a petition of right against the Crown in respect of a soldier's tort. Recovery was denied on the

ground that the master and servant relationship did not exist. In *Attorney General* v. *Valle-Jones*, [1935] 2 K. B. 209, on the other hand, which was an information on behalf of the Crown for loss of services of members of the Royal Air Force, the relationship of master and servant was held to exist, and recovery was had for their pay during incapacitation together with the expenses of their hospitalization.

In this connection it may well be significant that the doctrine of *respondeat superior* arose long after the loss of services doctrine, and historically formed no part of it. Certainly in other situations the right to recover damages for loss of services is wholly independent of a liability arising out of *respondeat superior*. Thus, an agent may be able to bind his principal in many situations where the principal has no corresponding right to recover from a tortfeasor for loss of the agent's services. And, conversely, a parent may recover for the loss of services of a child in circumstances where the actions of the child could not possibly bind or entail liability on the part of the parent.

6. The real vice of the decision below is that it denies recovery to the United States on two mutually contradictory theories. On the one hand, the court says that the government cannot avail itself of the common-law action of a master for loss of his servant's services because the relation-

ship between government and soldier is more legislative than contractual (R. 46). On the ther hand, the court insists that "the master's cause of action for loss of his employee's services remains as an anomaly in the law" (R. 43) because it permits recovery by one with whom the injured party was only connected by contract (*id.*).

Actually, of course, the loss of services doctrine is not an anomaly at all, but an ancient and recognized doctrine of great vitality. It is far older by centuries than any of the modern concepts of contract. And as that great master of legal history, the late Sir William Holdsworth, pointed out (3 *History of English Law*, (3d ed. 1923) 677):

> * * * actions *per quod servitium* and *per quod consortium amisit* are * * * ultimately * * * based upon the very peculiar history of the legal relations of master and servant, which has caused those relations to retain a number of ideas based on the conception that the servant occupies a status. The Statutes of Labourers deliberately introduced into the contractual relation some of the incidents of older status; and the courts of common law, quite apart from those statutes, held that the master's right to his servant's service was definite enough to be safeguarded by an action in tort against a person who retained a servant after notice of an employer's claim. [*Blake* v. *Lanyon*, 6 T. R. 221.] It

> is pretty clear also that the famous decision in *Lumley* v. *Gye* [2 E. & B. 216] to the effect that a persuasion to break any contract without just cause or excuse is actionable, is traceable historically to the firmness with which the judges have maintained the idea that the master has something in the nature of a real right to his servant's services.

The basic substantive error of the court below (apart from its misconception as to the proper choice of law; pp. 18–28, *supra*) lies in its refusal to apply a well-settled concept of legal liability to a new situation, where that new situation is in every respect similar to the old situation that originally gave rise to the concept, simply because the old situation today is more frequently met with in modern dress. Specifically, the fundamental error is the court's unwillingness to apply the loss of service doctrine to the government-soldier relationship, a relationship in every essential respect identical with the traditional master-servant status (except only that it is far more binding), simply because the master-servant status of today, in its modern aspect of employer and employee, is essentially contractual in nature, and has probably ceased to be a status.

We have pointed out above, pp. 44–45, that this Court has recognized the government-soldier relationship as a status, and we have the assurance of Holdsworth that, Maine's much-quoted apothegm

notwithstanding, new forms of status are constantly arising in progressive societies. Said Sir William (3 *History of English Law* (3d ed. 1923) 455–456):

> Maine's famous dictum that "the movement of progressive societies has hitherto been a movement from status to contract," is a generalization from the historical development of institutions and rules which originated in the patriarchal family. It is applied by Maine only to that department of law which mature legal systems style private law, and chiefly to that department of private law which comprehends those topics which the Roman institutional writers grouped under the rubric "law of persons." If we except those forms of status due to youth or mental incapacity, which must necessarily be found in all legal systems at all stages of their development, the dictum is in this department of private law very largely true. Thus, in Roman law, if we compare the status of the filius-familias or the married woman in the early days of Roman law with their status under Justinian; and if we look at the elimination of the status of mancipium, and the gradual assimilation of the class of libertini to that of ingenui, we see instances of the operation of this principle. Similarly, we can see it in operation in English law if we look at the history of the status of the villein and the married woman. But we must not give the dictum a greater extension than its author intended. In particular we must note

that it has never had any direct application in the sphere of public or semi-public law. On the contrary, the growth in progressive societies of the complexity both of the state and of social, commercial, and industrial relations has led to the growth of new varieties of status. Under the later Roman Empire the soldier and the civil servant occupied a far more definitely defined status than in primitive society; and under the early empire one of the effects of the change in the character of slavery produced by the foreign conquests of Rome was the statutory creation of the status of the Latini Juniani and the Dediticii. Under all modern systems of law the soldier, and under most continental systems of law the civil servant, occupy a status unknown to early systems of law; and the growth of corporations has added a new population of artificial persons to all modern states. Religion, too, has at all times claimed for its priests a special status; and this special status of priests, and the still more special status of those who occupy the higher ranks in religious hierarchies, have been, both in ancient and in modern societies, perhaps the most enduring of all forms of status. No doubt the decay of certain forms of status, and the appropriation of the sphere which they once occupied by the law of contract is the mark of certain progressive societies. But new forms of status have been constantly arising and it is the fact that the societies in which they have arisen

are progressive societies that is the cause and occasion for their creation.[19]

The basic question in the present case is whether the law of today has still the vitality of the law of old, so that it can adapt the tested principles of the past to the constantly changing fact situations of today. Cf. Holdsworth, *Some Makers of English Law* (1938), *passim*. The circumstance that, as the court below remarked (R. 45), "the government has never asserted this cause of action before," or that the first reported case on the subject dates only from 1935,[20] is, of course, immaterial. Similar objections interposed in this same field—interferences with status—have never succeeded in the past. Even in the most rigid period of the Eighteenth Century common law, the Court of Common Pleas refused to arrest judgment in an action for enticing away a man's wife simply because there was not precedent for such an action. *Winsmore* v. *Greenbank*, Willes 577, 580–581 (1745).[21]

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[19] In view of this discussion, it seems to us unnecessary to turn to the *institution* of the French jurists, or to subject Sir Henry Maine to the assaults of critical sociologists. Cf. R. 13–17, 23.

[20] *Attorney General* v. *Valle-Jones*, [1935] 2 K. B. 209.

[21] And see *Chapman* v. *Pickersgill*, 2 Wils. 145, 146 (1762), *per* Pratt, C. J. (later Lord Camden): "But it is said this action was never brought; and so it was said in *Ashby* v. *White*: I wish never to hear this objection again. This action is for a tort; torts are infinitely various, not limited or confined, for there is nothing in nature but may be an instrument of mischief * * *."

The Twentieth Century has not until this time been less resourceful than the Eighteenth. Prior to *Gray* v. *Gee*, 39 T. L. R. 429, there was no precedent for a wife's action against another woman for enticing away a husband; but the action was allowed. Nor was there, before *Daily* v. *Parker*, 152 F. 2d 174 (C. C. A. 7), any reported case holding that the parent-child relationship supported an action by the children against the woman who enticed away their father. Here again, the court found no difficulty in applying old principles to a new state of facts; it permitted the plaintiffs to maintain the proceeding. More recently, there has been a successful attempt, notwithstanding *Dietrich* v. *Northampton*, 138 Mass. 14, to permit a viable child to recover for injuries suffered in the process of birth as a result of negligence. *Bonbrest* v. *Kotz*, 65 F. Supp. 138 (D. D. C.). And only at the last Term, this Court found it possible to fashion a remedy within the pattern of familiar principles to protect a longshoreman performing work which in earlier days was more usually done by a seaman. *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85.

Up to now the common law has never been straitjacketed by the lack of exact precedents, just as long as the right invaded was one similar to rights for which recognized remedies were available. Cf. Pound, *The Spirit of the Common Law* (1924) 183. Indeed, as the late Chief Justice pointed out, a case such as the present one is

really a measure of the law's vitality, and of its capacity for growth. See Stone, *The Common Law in the United States* (1936) 50 Harv. L. Rev. 4, 9–10:

> If, with discerning eye, we see differences as well as resemblances in the facts and experiences of the present when compared with those recorded in the precedents, we take the decisive step toward the achievement of a progressive science of law. If our appraisals are mechanical and superficial, the law which they generate will likewise be mechanical and superficial, to become at last but a dry and sterile formalism.
>
> It is just here, within the limited area where the judge has freedom of choice of the rule which he is to adopt, and in his comparison of the experiences of the past with those of the present, that occurs the most critical and delicate operation in the process of judicial lawmaking. Strictly speaking, he is often engaged not so much in extracting a rule of law from the precedents, as we were once accustomed to believe, as in making an appraisal and comparison of social values, the result of which may be of decisive weight in determining what rule he is to apply. * * * The skill, resourcefulness and insight with which judges and lawyers weigh competing demands of social advantage, not unmindful that continuity and symmetry of the law are themselves such advantages, and with which they make choice among them in determining whether precedents shall be

extended or restricted, chiefly give the measure of the vitality of the common-law system and its capacity for growth.

With all deference to the learning reflected in the district court's opinion, we find it unnecessary to go beyond the confines of the common law to establish the government's right to recover here. We have pointed out above at some length, pp. 43–53, that every element of the relationships traditionally protected against torts which result in a loss of services is present in the government-soldier relationship that is here in issue. Indeed, as we have shown, the obligation of service resting on the soldier is far more onerous than that of the child, wife, servant or apprentice. Dissolution of the relationship cannot be had by unilateral action of the soldier; all of the others are easier of termination.

By way of emphasizing the right of the United States to the services of its soldiers, we might add that the act of preventing the United States from obtaining such services is a criminal offense (Section 11 of the Selective Training and Service Act of 1940, 50 U. S. C. App. 311; cf. *Billings* v. *Truesdell*, 321 U. S. 542, 556–558); that any obstruction to enlistment in time of war, i. e., preventing the consummation of a contract of service, is likewise criminal (Section 3 of Title I of the Act of June 15, 1917, c. 30, 40 Stat. 219, as amended; 50 U. S. C. 33); and that harboring a deserter, i. e., one who unilaterally is seeking to

avoid such service, is also an act entailing criminal liability. Section 42 of the Criminal Code, 18 U. S. C. 94; see *Beauchamp* v. *United States*, 154 F. 2d 413 (C. C. A. 6), certiorari denied, October 14, 1946 (No. 230, this Term).[22]

We are dealing here with realities, not with labels. A master has such a right to the services of his servant or apprentice that any tort which deprives him of those services entails liability to the master. The same is true of the husband's right to the services of his wife and of the parent's right to the services of his child. The government's right to the services of its soldiers is a right far superior to any of those just enumerated. We submit that there necessarily exists a similar right to recover damages when a tortfeasor deprives it of those services, services growing out of a relationship created by law pursuant to an express grant of constitutional power.

III

THE RELEASE EXECUTED BY THE SOLDIER IN RESPONDENTS' FAVOR IS IMMATERIAL, SINCE THE UNITED STATES HAS AN INDEPENDENT CAUSE OF ACTION UNDER WHICH IT RECOVERS ONLY FOR THE DAMAGES IT HAS ITSELF SUSTAINED.

The court below held (R. 46) that the release of his own claims executed by Etzel in favor of

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[22] Compare the criminal liability involved in conspiring to deprive the United States of the faithful and disinterested services of an Army officer. *United States* v. *Bayer and Radovich*, No. 606, this Term.

respondents (R. 9) constituted a complete bar to the present action by the United States for loss of services, measured by the wages paid Etzel during his incapacity and by the cost of his hospitalization. Respondents here assert the correctness of that holding (Br. Opp. 23–25), and contend in addition that, even if the United States were entitled to any recovery, it can not recover for Etzel's wages and medical expenses (Br. Opp. 21–34).

We submit that the holding below and respondents' contentions here are both based on a misconception of the nature of the claim asserted by the United States. That claim is an independent cause of action collateral to and not consequent upon the soldier's cause of action. Hence recovery by the United States is neither dependent on nor barred by any recovery which the soldier may have had or by any release which he may have given. And the items of recovery sought here—the actual out-of-pocket expenses of the soldier's pay during his incapacity and of the cost of his hospitalization—are recognized as items of recovery in like cases, and are, as applied to the present kind of action, far from excessive.

1. The gravamen of an action of trespass *per quod servitium amisit* is the master's loss of services, not the injury to the servant. If the servant is beaten, but not sufficiently to incapacitate him, the master has no action. *Voss* v. *Howard*, 1

Cranch, C. C. 251, Fed. Case No. 17013 (C. C. D. C.). All this has been well understood since the time of Coke. See *Robert Marys's Case*, 9 Co. Rep. 111b, 113a:

> * * * if my servant is beat, the master shall not have an action for this battery, unless the battery is so great that by reason thereof he loses the service of his servant, but the servant himself for every small battery shall have an action; and the reason of the difference is, that the master has not any damage by the personal beating of his servant, but by reason of a *per quod, viz. per quod servitium, &c. amisit;* so that the original act is not the cause of his action, but the consequent upon it, *viz.* the loss of his service is the cause of his action; for be the battery greater or less, if the master doth not lose the service of his servant, he shall not have an action.

The injury to the servant and that to the master are collateral to and not consequent upon each other; the servant sues for personal injuries, the master for loss of services. See *Martinez* v. *Gerber*, 3 M. & G. 88, 90–91. So, too, the child sues for personal injuries and the parent for loss of services. *Berringer* v. *Great Eastern Ry. Co.*, L. R. 4 C. P. D. 163; *Louisville & N. R. R. Co.* v. *Willis*, 83 Ky. 57; *Callaghan* v. *Lake Hopatcong Ice Co.*, 69 N. J. L. 400; *Franklin* v. *Butcher*, 144 Mo. App. 660; cf. *Whitney* v. *Hitchcock*, 4 Denio

(N. Y.) 461. The husband, likewise, sues for loss of services and consortium, while the wife alone can recover for personal injuries. *Erickson* v. *Buckley*, 230 Mass. 467; *Lansburgh & Bro.* v. *Clark*, 127 F. 2d 331 (App. D. C.); compare *Blair* v. *Chicago & Alton R. R. Co.*, 89 Mo. 334, with *Blair* v. *Chicago & Alton R. R. Co.*, 89 Mo. 383.

It follows that a prior recovery by the child in respect of personal injuries will not defeat a subsequent suit by the parent for loss of services. *Wilton* v. *Middlesex R. Co.*, 125 Mass. 130. Indeed, the parent recovers in the seduction cases for a loss of services in circumstances where the debauched daughter has no right of action of her own. *Hornketh* v. *Barr*, 8 Serg. & R. (Pa.) 36; and see *supra*, pp. 33–36. Similarly, the husband's action for loss of services may succeed despite the failure of the wife's action for personal injury. *Lansburgh & Bro.* v. *Clark*, 127 F. 2d 331 (App. D. C.). And by parity of reasoning, recovery by the servant for his personal injuries is no bar to a later action by the master for loss of services. *Jones* v. *Waterman S. S. Corp.*, 155 F. 2d 992 (C. C. A. 3); *Bradford Corporation* v. *Webster*, [1920] 2 K. B. 135; *Attorney General* v. *Valle-Jones*, [1935] 2 K. B. 209. The seaman in *Jones* v. *Waterman S. S. Corp.* had settled with the tort-feasor, 155 F. 2d at 995, yet Waterman was allowed to recover for loss of services. The constable in *Bradford Corporation* v. *Webster* had

recovered from the tortfeasor, [1920] 2 K. B. at 143, as had the injured aircraftsmen in the *Valle-Jones case,* [1935] 2 K. B. at 210, 215; recovery for loss of services was allowed in each instance. And while, as has been noted, recovery was denied in *Commonwealth* v. *Quince,* 68 Comm. L. R. 227, the majority did not rest their decision on the circumstance that the soldier had already obtained payment from the tortfeasor.

It follows from the foregoing that the district court was right in holding that the claim of the United States was not barred by Etzel's release (R. 20, 31), and that the court below erred in reaching a contrary conclusion.

2. The same failure to recognize that the government's cause of action for loss of services was separate and distinct from the soldier's cause of action for personal injuries led the court below to rest its denial of recovery on the ground that under the prevailing American rule, an injured person may recover for wages lost and medical expenses incurred during his incapacity even though such amounts were supplied by insurance, contract of employment, or gratuitously; that Etzel's release to the respondents (R. 9) which extended to "all claims of every nature and kind whatsoever" covered his lost wages and medical expenses; and that the United States may not be subrogated to the soldier's claim because the respondents have already paid Etzel for his losses (R. 46-47).

It may be that, under some of the cases, the measure of recovery allowed the victims of negligence is too generous, and work injustice to tortfeasors, as where the latter are not entitled to deduct for compensation which the injured person is receiving from the Government. E. g., *Cunnien* v. *Superior Iron Works,* 175 Wis. 172; *Wood* v. *Ford Garage Co.,* 162 Misc. 87; see note 23, *infra,* p. 74. But the circumstance that the injured servant gets too much is no ground for denying the master any recovery at all for loss of services. And since the loss of service cases involve two distinct causes of action, it is both misleading and erroneous to invoke cases where there is but a single cause of action and the employer sues the tortfeasor as subrogee of the employee's claim. E. g., *Travelers' Ins. Co.* v. *Great Lakes Eng. Co.,* 184 Fed. 426 (C. C. A. 6); *Stinchcomb* v. *Dodson,* 190 Okla. 643. The basis of the employer's recovery in the latter kind of case is the employee's claim for injury which the employer has theretofore paid. The same concept underlies federal statutes which permit subrogation by the United States, and which were relied on by the court below (R. 48). E. g., 5 U. S. C. 776–777; 38 U. S. C. 421, 502; cf. *American Stevedores* v. *Porello,* No. 69, this Term, decided March 10, 1947. In the present case, however, the United States appears, not as Etzel's subrogee in respect of the injuries to his person, but in its own right, on

account of the injury to the United States which caused it to lose Etzel's services.

3. Once the independent nature of the government's cause of action is recognized, all talk of "splitting a cause of action," as in *Philadelphia* v. *Philadelphia Rapid Transit Co.*, 337 Pa. 1, is of course irrelevant. If there were a single cause of action, as in the subrogation cases, then, obviously, recovery for all the elements of damage should be sought in one proceeding. But since here separate, independent, and essentially unrelated rights are being asserted, there can be no question of "splitting," even though, as a matter of convenience, permissive joinder of the two actions could be had. See, e. g., *Lansburgh & Bro.* v. *Clark*, 127 F. 2d 331 (App. D. C.) (husband and wife); *Erickson* v. *Buckley*, 230 Mass. 467 (same); *Berringer* v. *Great Eastern Ry. Co.*, L. R. 4 C. P. D. 163 (parent and child). Consequently, as in the first two cases cited, recovery could be had on one and not on the other, without vitiating inconsistency.

4. The measure of damages sought here was based on the government's out-of-pocket expenditures. As we have shown, *supra*, pp. 47–48, the United States was under an enforceable statutory duty to continue Etzel's pay during hospitalization. It was also under a duty, based in part on statute and in part on regulations having the force of law, to provide him with medical treatment. See p. 48, *supra*; and note Section 3 (d)

of the Selective Training and Service Act of 1940, 50 U. S. C. App. 303 (d), providing that drafted men are to be allowed all benefits accorded other enlisted personnel. The damages asked for in the instant action represent the sums expended for the medical care which was furnished the injured soldier, and for the salary which was paid him (R. 4, 8).

Where the master is under a duty to maintain the servant, which is always the case in actions by a parent for loss of services of his child, expenditures for hospital and medical care required by the defendant's tort have always been considered a proper element of the master's or parent's damages. *Netherland-American Steam Nav. Co.* v. *Hollander*, 59 Fed. 417 (C. C. A. 2); *Jones* v. *Waterman S. S. Corp.*, 155 F. 2d 992 (C. C. A. 3); *Sawyer* v. *Sauer*, 10 Kan. 519; *Franklin* v. *Butcher*, 144 Mo. App. 660; *Coon* v. *Moffitt*, 2 Pen. (N. J.) 583; *Callaghan* v. *Lake Hopatcong Ice Co.*, 69 N. J. L. 100; *Hodsoll* v. *Stallebrass*, 11 A. & E. 301; *Martinez* v. *Gerber*, 3 M. & G. 88; *Attorney General* v. *Valle-Jones*, [1935] 2 K. B. 209. Indeed, in cases involving injuries to minor children of such tender years as to be incapable of rendering services, recovery of the expenses of hospitalization is allowed on the ground that the parent was bound to incur this expenditure as a part of his duty to the child. See *Dennis* v. *Clark*, 2 Cush. (Mass.) 347; *Durden* v. *Barnett*, 7 Ala. 169; *Sykes* v. *Lawlor*, 49 Cal. 236; *Cuming* v.

Brooklyn City R. R. Co., 109 N. Y. 95; cf. *Hall* v. *Hollander*, 4 B. & C. 660, 662. Similarly, in this case, the United States was bound to hospitalize the soldier.[23] To have discharged Etzel forthwith would have been unlawful as well as inhumane; and, in any event, Etzel even as a discharged soldier could have recovered his medical expenses in his own action for personal injury. *District of Columbia* v. *Woodbury*, 136 U. S. 450; *Vicksburg & M. R. Co.* v. *Putnam*, 118 U. S. 545; *Carangelo* v. *Nutmeg Farm*, 115 Conn. 457; *Eureka Block Coal Co.* v. *Wells*, 29 Ind. App. 1; see *Attorney General* v. *Valle-Jones*, [1935] 2 K. B. 209, 217–220.

The same is true as to the pay received by Etzel. If he had been discharged because of the injury, he could have sued respondents for his loss of

[23] The rule denying the tortfeasor the right, in an action for personal injuries brought by the injured employee, to deduct sums received by that employee by way of compensation from other sources, see R. 46–47, appears to have been primarily established in cases where the defense has been raised against the injured party in instances where the person supplying his wages and hospital expenses did so gratuitously, or under a contract of insurance. That rule has not been universally adopted and in other states the issue whether the payments are in fact gratuitous will govern the result. See the cases collected in 18 A. L. R. 678–683 and 98 A. L. R. 575–579; and compare *Illinois Central R. Co.* v. *Porter*, 117 Tenn. 13, 31–32 (tortfeasor not entitled to deduct from ordinarily consequential damages salary actually paid injured postal clerk because, under postal laws, payment during illness was a matter for discretion of postal officials and hence could be considered a gratuity).

earnings; here they are called on to pay that sum to the United States. In the *Valle-Jones* case, recovery of the aircraftsmen's pay was held to be a proper item of damages, and in *Commonwealth* v. *Quince,* 68 Comm. L. R. 227, although recovery was denied, a majority of the court agreed that pay plus medical expenses would be a proper measure of damages if the action were maintainable.

5. Actually, the measure of the United States' damages on which the judgment of the district court was based was a generous one so far as the respondents were concerned. No question arises as to the expenses of hospitalization; that amount was stipulated (R. 8). But to measure the United States' loss of services on the footing that it paid Etzel $69.31 as military pay (R. 4)—money for which it received no equivalent since Etzel was incapacitated—is in at least two respects short of what the United States lost by reason of respondents' tort.

(a) The United States was not only bound to pay Etzel during his incapacity, it was bound to subsist him, see 10 U. S. C. 724–726, and for this additional expenditure, which it was bound by law to make, it received no return either. We think that the cost of subsistence could well have been included as an item of damages. Certainly if Etzel had been discharged because of incapacity immediately upon being injured, it is elementary that he could have recovered from the tortfeasors

a sum representing his loss of earning power, which would undoubtedly have included the commuted value of all the benefits of subsistence, shelter, and clothing which were incident to and inseparably connected with his employment, which had a substantial value, and of which he had been deprived by reason of the defendants' tort. See Section 10 of the Pay Readjustment Act of 1942, as amended; 37 U. S. C., Supp. V, 110.

(b) The United States is seeking to recover pay from the respondents on the view that it paid Etzel but, because of the tort, received no services. The record does not indicate Etzel's grade or length of services, both of which are material in determining his pay. See Section 9 of the Pay Readjustment Act of 1942, as amended; 37 U. S. C., Supp. V, 109. But assuming that he was a private with less than three years' service, and not qualified in arms or serving in a branch of service or in a capacity entitled to additional pay,[3] he would not have been receiving more money at the

[3] See Sec. 18 of the Pay Readjustment Act of 1942, as amended, 37 U. S. C., Supp. V, 118 (flying, parachute, and glider pay); Act of April 10, 1943, c. 47, 57 Stat. 62, 37 U. S. C., Supp. V, 118b (diving pay); Sec. 16 of the Pay Readjustment Act of 1942, 37 U. S. C., Supp. V, 116 (extra pay for qualification in the use of arms); Sec. 1 of the Act of June 30, 1944, c. 335, 58 Stat. 648, 10 U. S. C., Supp. V, 1430a (extra pay for wearers of expert and combat infantrymen's badges); Sec. 1 of the Act of July 6, 1945, c. 279, 59 Stat. 462, 10 U. S. C., Supp. V, 1430b (extra pay for wearers of the medical badge); 10 U. S. C. 696 and 1430 (extra pay for wearers of certain decorations).

end of a year's training than when he first took the oath as an inductee or recruit. Yet obviously the United States would have lost more if deprived of the services of a trained soldier than of those of an untrained one. The scope of the recovery sought in this case gives the respondents the benefit of any doubt as to whether the injured soldier was specially trained—a not inconsiderable advantage "at a time when the government-soldier relation has attained its most exacting standards and its greatest dignity." See Note (1946) 41 Ill. L. Rev. 551, 558.

CONCLUSION

For the foregoing reasons, the judgment of the circuit court of appeals should be reversed, with directions to reinstate the judgment of the district court.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.
No. 235.

UNITED STATES OF AMERICA,

Petitioner,

vs.

STANDARD OIL COMPANY OF CALIFORNIA and IRA BOONE,

Respondents.

Brief in Opposition to Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

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The respondents file this brief in opposition to the petition for writ of certiorari heretofore filed herein.

Statement.

In addition to the matters set forth in the statement in the petition, it should be noted that the ground of recovery, as stated in the complaint in this case, was that the soldier John Etzel, was the "servant" of the plaintiff. [Record, pp. 2 and 4.] The right of recovery was not based upon any assignment from the injured man for none was either alleged or proved. Nor was it based upon any right of subrogation for none has ever been claimed.

The complaint [Record, p. 4] after alleging that the services of John Etzel were lost to plaintiff during the time he was laid up, then goes on and alleges "and also by reason thereof, plaintiff became liable to pay and did pay John Etzel as compensation salary and wages for the aforesaid period the sum of $69.31 and that by reason of the injuries sustained by John Etzel, the plaintiff has expended for hospital care the sum of $123.25." Thus, the complaint on its face recognizes that the services of John Etzel which were lost to the plaintiff were something different from and outside of the payments which the Government, plaintiff herein, paid to him and for his benefit.

It should also be noted that the findings of fact [see par. 3, Record, p. 28] of the trial court specifically reject the idea that John Etzel, the injured man, was a servant of the plaintiff. While it is stated in a note thereto that the words "and as such servant of plaintiff" were stricken at the request of counsel for defendants, as per letter dated June 8, 1945, that letter, as appears in the Record, page 26, merely called the attention of the trial court to the fact that any such finding was contrary to the opinion of the court. Thus, under the record, although this action was brought upon the theory that the injured man was the servant of the plaintiff, the trial court rejected that theory, declined to find that the relation of master and servant existed, and based its judgment solely upon the finding that the injured man, John Etzel, was a member of the Army of the United States of America.

There is presented at the outset of this case the anomalous situation that the trial court rejected the idea that the master and servant relation was involved, declined to find that such relation existed, and yet the petition for the writ states (p. 2) that the statute involved in Section 49 of the California Civil Code, which provides in substance that the rights of personal relations forbid any injuries to a servant which affects his ability to serve his master. In other words, stating the matter baldly, counsel for plaintiff rely upon Section 49 of the California Civil Code whereas the court has found that the relation of master and servant does not exist and impliedly, therefore, that no cause of action exists under the California Civil Code upon which counsel for plaintiff relies.

With this preliminary statement, we now proceed to examine more critically the authorities and law applicable to the facts under the following general outline.

I. The relation of master and servant did not exist between the government and the soldier John Etzel. In the absence of such relation, no cause of action exists in the Government either under California law, Federal law, or common law.

II. Even if the relation of master and servant could be supposed to exist between the petitioner and the soldier, no cause of action rests in the petitioner to recover from a third party, such as respondents, the money paid by petitioner to the soldier for his compensation as a soldier during the time he was incapacitated nor for the money paid by petitioner for the hospital expenses of such soldier.

I.

The Relation of Master and Servant Did Not Exist Between the Government and the Soldier John Etzel. In the Absence of Such Relation, No Cause of Action Exists in the Government Either Under California Law, Federal Law, or Common Law.

Let us examine first the contention now made by petitioner concerning the alleged right of petitioner to some right of recovery now claimed to exist under federal law. No federal statute is cited under which it is claimed the petitioner has any right of recovery nor have we discovered any. The opinion of the Circuit Court of Appeals points out that there is no federal statute which might afford the government a means for bringing the action [Record, p. 42]. It does not appear from the petition just what counsel for petitioner have in mind in referring to "federal law." The argument is made (in spite of the finding of the trial court that the relation of master and servant did not exist) that petitioner is entitled to recover upon the ground that the injured man was performing services and therefore petitioner is entitled to recover not upon any common law theory of master and servant but merely by reason of the relation between the government and its soldier. So far as we have discovered, the common law has never been supposed to give a cause of action in such a case as this without being predicated upon the master and servant relationship, except in one case, *Attorney General v. Valee Jones* (1935), 2 K. B. 209, which we shall hereafter refer.

As pointed out in the opinion of the Circuit Court of Appeals, the general rule has been held to be that when the United States comes into court to assert a claim, it so

far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter. *U. S. v. The Thekla*, 266 U. S. 328, 340. This rule that where the United States voluntarily goes into court it must do so as other suitors has been recognized from the early times. See *Brent v. Bank of Washington*, 10 Pet. 596, 614; *Mitchell v. Peters*, 9 Pet. 711, 743. It was applied in the case of *U. S. v. Moscow Idaho Seed Co.*, 92 F. (2d) 173, 174, in a case similar to the one at bar. There the United States went into court as plaintiff in an automobile damage case, claiming damages to its automobile driven by one of its employees, and the court held that the issue should be determined in accordance with rules of law applicable between private litigants. We believe the doctrine enunciated in the foregoing cases constitutes the broad general rule applicable to suits when the United States comes into court as a plaintiff.

The cases mentioned by counsel for petitioner on page 13 of the petition do not affect the general principal but merely illustrate certain exceptions. Thus, in *United States v. Allegheny County*, 322 U. S. 174, it was decided that where property is owned by the United States, that property cannot be taxed by any local municipality under subterfuge of taxing one possessing and using the property under a contract with the United States for this would, in effect, be permitting a state under its laws to tax the United States, which cannot constitutionally be done. The point decided in *Clearfield Trust Company v. United States*, 318 U. S. 363, was that the rights and duties of the United States on commercial paper which it issues are governed by federal rather than by local law.

The case of *Board of Commissioners v. U. S.*, 308 U. S. 343, holds in substance that the above doctrine does not

mean that laches and state statutes of limitation may be applied against the United States. This would be contrary to the general rule that statutes of limitation do not operate against the sovereign unless specifically so provided. *D'Oench, Duhme & Co. v. Federal Deposit Insurance Corporation*, 315 U. S. 447, was decided under a statute which provided by its terms that all suits of a civil nature at common law or in equity to which the Federal Deposit Insurance Corporation was a party should be deemed to arise under the laws of the United States, with certain exceptions not pertinent. To similar effect is *Deitrick v. Greaney*, 309 U. S. 190, which holds that judicial determination of the legal consequences which flow from acts condemned as unlawful by the National Bank Act involves decision of a federal, not a state, question.

One other case should perhaps be mentioned as cited by petitioner in the petition for rehearing before the Circuit Court of Appeals. It is *Dailey v. Parker*, 152 F. (2d) 174. In that case the court was considering the rights of children to claim damages against one who, by enticement and wrongdoing, had taken from them the support and maintenance of their father. There was no statute upon the matter, as in our case, nor were there any decisions of the said court. The court held that in the absence of any statute or decisions, it would decide the matter for itself and used this very pertinent language in referring to the rights of the children.

> "They will be denied if it appears that the state court has spoken and denied them. If said rights have not been denied in the state court, we see no reason why the federal court should be more prone to deny them or grant them than the state court. If the state court has not acted, we are free to take the course which sound judgment demands."

Not only is there no federal statute giving the government a right of action in this case but, on the contrary, the federal statutes provide that:

> "The laws of the several states, except where the constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."
>
> 1 Stat. at Large, 73, 92, Chap. 20; 28 U. S. C. A. Section 725.

And this statute was authoritatively applied in accordance with its terms in *Erie v. Tompkins*, 304 U. S. 64; 58 S. Ct. 817; 82 L. Ed. 1188. See, also, *West v. American Telephone & Telegraph Company*, 311 U. S. 223; 61 S. Ct. 179; 85 L. Ed. 139.

From what has been said, it is apparent that counsel for petitioner has not pointed out any federal law which he claims to be involved in the decision of this case.

We pass, then, to a consideration of the applicable statute, namely: Section 49, subdivision c, of the California Civil Code and to the relation existing between the government and its soldiers.

The only statutory authority in California for an action by a master arising out of injuries to his servant is contained in Civil Code, Section 49, subdivision c. This section, so far as pertinent here, reads as follows:

> "The rights of personal relations forbid:
>
> "(c) Any injury to a servant which affects his ability to serve his master, other than seduction, abduction, or criminal conversation."

It may be noted in passing, and to this we shall advert again, that the injury referred to in the section is one "which affects his ability to serve." In other words, the action recognized by this section is an action arising from inability to serve.

Certain statutory provisions in California, in addition to Civil Code, Section 49, give a right of action by one for the injury or death of another. Thus, by section 376 of the Code of Civil Procedure, a right of action is given to a father for the injury or death of a minor child or to a guardian for the injury or death of a ward. Section 377 of the Code of Civil Procedure gives a right of action for death of an adult. Section 375 of the Code of Civil Procedure provides for an action by a parent for the seduction of a female child below the age of legal consent. California Workmen's Compensation Law gives an employer the right under certain circumstances to maintain an action against a third party tort feasor. Aside from the causes of action so provided, there do not appear to be any statutory provisions in California giving a right of action in one person for injuries sustained by another.

It should be remembered also that prior to 1939 Section 49 of the California Civil Code was much broader and gave a right of action for the abduction of a husband from his wife or of a parent from his child, for the abduction or enticement of a wife from her husband, the seduction of a wife, daughter, orphan sister, or a servant. In 1939, by California Statutes 1905, page 68, Section 49 of the Civil Code was amended so as to take away the foregoing rights of action, leaving the section as it now exists. Both before and after the foregoing amendment of 1939, Section 49 of the Civil Code was in dero-

gation of the common law and in California the rule of the common law that statutes in derogation thereof are to be strictly construed has no application. See Section 4, California Civil Code. Thus, California, having legislated on the subject as to what disturbances of personal relationships give rise to a cause of action, has indicated its clear intention that a right of action shall exist only in the instances permitted by statutory law.

Certain it is that there is no California Statute specifically granting a right of action to anyone on account of injuries to a soldier. Therefore, under California Statutory Law, unless a soldier is a servant of the United States and unless the United Sttaes is his employer or master within the meaning of the terms "master and servant," there is no statutory provision in California for the maintenance of an action such as this.

At common law, also, the rule was the same. In other words, unless the relation of master and servant existed, there could be no recovery by one person for injuries sustained by another.

Bartley v. Richtmyer, 4 N. Y. (Comstock) 38.

This was an action for damages for seduction of the plaintiff's stepdaughter. Common Law based the right of action for seduction of a daughter upon the theory that the relation of master and servant existed between the father and daughter. In this case it is said (p. 340):

> "When the daughter is of full age, the father is not entitled to her services; and he cannot maintain this action without showing that the relation of master and servant actually existed at the time of the injury."

And, again:

"The gist of the action is loss of service."

A little later in the opinion, the court, in explaining the nature of the action, says:

> "The courts went to the full length of their powers when they held that the relation of parent and child might be regarded as that of master and servant for the purpose of supporting this class of action."

The case of *Nickleson v. Stryker*, 10 Johnson (N. Y.) 115, was an action by a father for the debauching of his daughter, who was an adult. As above stated, such an action at common law was allowed only upon the fiction or theory that the daughter was the servant of her father. In this case, the court holds that whereas, if a daughter is a minor, the father's right to her services may be presumed, yet, where a daughter is of age,

> "she must be in her father's service, so as to constitute, in law and in fact, the relation of master and servant, in order to entitle her father to a suit for seducing her."

The reason for the rule is stated as follows in the case of *Woodward v. Washburn*, 2 Denio, 369, 374:

> "The reason and foundation upon which this doctrine is built seem to be the property that every man has in the service of those whom he has employed, acquired by contract of hiring, and purchased by giving them wages."

Originally, it seems the Common Law gave the master no right of action against a third person for an injury inflicted upon his servant, causing loss of service, except

where the servant was a menial one. In other words, the master was held to stand in *loco parentis.*

Burgess v. Carpenter, 2 So. Car. 7.

At Common Law the master had a cause of action for loss of services of a servant because he had a certain property right in the services and it was this property right which the common law sought to protect and which formed the basis of an action.

Tidd v. Skinner, 225 N. Y. 422, 122 N. E. 247.

Thus, it would appear that both under the Common Law and under California Statutory Law, unless the relation of master and servant existed as between the Government and the injured soldier, John Etzel, the plaintiff can have no cause of action for loss of services against a third person arising out of the tortious injuries to the soldier.

What, then, is the nature of the relation existing between the sovereign and its soldier? Is that relation one of master and servant or is it something different? We have already pointed out that the trial court in this case declined to find that the relation between the government and the soldier, John Etzel, was that of master and servant. The effect of the trial court's finding was that the relation did not exist. We shall, however, proceed to examine the question more at large.

It has been answered several times in this country although not until recently in any action similar to the present one. Since the judgment was rendered in the instant case, another federal court had occasion to consider the question in the case of *U. S. v. Atlantic Coast Line R. Co.,* 64 Fed. Supp. 289, and held that there was no cause of action in the government to recover the cost of

hospitalization, nursing care, and wages paid to an injured sergeant whose injuries had been caused by the tortious act of the defendant. The opinion holds that the relation existing between the government and the soldier was not that of master and servant and was not such as to give rise to any cause of action in the government to recover its expenditures.

The general rule seems to be that the soldier is not acting as an employee or a servant of his government but is performing his duties in an entirely different capacity. He is performing his general duties as a citizen to defend and protect his country. The matter was considered in the case of *Goldstein v. State*, 281 N. Y. 396, 24 N. E. (2d) 97, which involved the relation of a state militia man to the State of New York. The court, in discussing the question as to whether such a militia man or soldier (for he certainly is a member of the armed forces) is a servant and after pointing out that employees generally under our system of government are free men and have the same standing, rights, and privileges possessed by other members of our body politic, who may work or not according to their own free will, and if engaged in work may quit at any time if they desire without liability except when prevented by the terms of some express contract, and may even engage in strikes against their employers, says:

> "Upon the other hand, when a man becomes a member of the State Militia, he must, when in active service, surrender for the benefit of the State certain of the privileges enjoyed by working men who are employees. Under the Military Law (Consol. Laws, Ch. 36) a member of the Militia may be tried for various military offenses, for acts which are not illegal under any other law. He may be tried and

punished by a military tribunal and if found guilty may be punished by fines and in certain cases by imprisonment. He cannot quit while in active service without consent of his superiors. Members of the State Militia do not become members for the purpose of receiving the small per diem allowances awarded them by the State while they are in active service * * *. *It seems clear that one who joins the State Militia and is engaged in active service therein is in no sense an employee of the State. He is simply performing a duty which he owes to the sovereign State as a resident and citizen.* It makes no difference whether he does that voluntarily in time of peace or in response to the call of the Governor in time of trouble." (Italics ours.)

A similar conclusion was reached by the Supreme Court of Illinois in the case of *Hays v. Illinois Terminal Transportation Co.*, 363 Ill. 397, 2 N. E. (2d) 309. The court says:

"The relation between the State and those who are in voluntary military service is essentially different from the relation which obtains between master and servant. Military service is based upon the duty which every citizen owes to the sovereign and differs from ordinary employment in this: That the enlisted man cannot terminate his service at will. * * * It thus appears that although an enlistment is a contract, it is not the usual contract of employment contemplated by the Workmen's Compensation Act."

The same subject was also discussed by the Supreme Court of Nebraska in the case of *Lind v. Nebraska National Guard*, 144 Neb. 122, 130, 12 N. W. (2d) 652. The Nebraska Court stated:

"We are disposed to agree with the conclusion arrived at by the courts of New York and Illinois. We

adopt the view that members of the Nebraska National Guard are not employees of the state or any agency created by it within the meaning of the Workmen's Compensation Law but that as members of the National Guard, when on duty, are engaged in the performance of the duty which the citizen owes to the sovereign of which he is a part along with every other citizen."

Cogent support is given to these authorities by the opinions of this court in *Selective Draft Law Cases*, 245 U. S. 366, 38 S. Ct. 159, 62 L. Ed. 349, and in *United States v. Schwimmer*, 279 U. S. 644, 49 S. Ct. 448, 73 L. Ed. 889, wherein it is held that a citizen, in rendering military services in time of war, is merely performing a duty which rests upon him as one of the obligations of citizenship.

Diligent search has discovered only two other cases similar to the case at bar. One arose in England. It is the case of *Attorney General v. Valle-Jones*, 2 K. B. (1935) 209. It was much relied upon by plaintiff in the trial court. In that case, the Crown sought to recover wages paid to and hospital services paid for certain injured aircraftsmen who sustained their injuries in an accident caused by the negligence of the defendant. The Crown was permitted to recover. This case is of no assistance in attempting to determine what relation exists between a government and its soldiers. The question as to whether the relation of master and servant existed between the Crown and the airmen was neither argued nor decided. That question seems not to have been raised at all by the counsel for the defendant. Upon that question the case, in effect, went by default. The only points decided by the court were two: That the wages paid to

the airmen during their disability could be recovered, as could likewise the cost of medical and hospital treatment. There is but little authority cited and the decision is of no value in discovering the true relation existing between a government and a soldier.

The only other case which has been discovered and which involves an exactly similar question arose in Australia. It is the case of *Commonwealth v. Quince*, originally decided in the Supreme Court at Brisbane and reported in the Queens Law Reporter of August 28, 1943, page 91, and later, upon appeal, the opinions appear in the Argus Law Reports, 50 *et seq.* and 68 Comm. L. R. 227. In the case just cited, the Commonwealth sought to recover from the defendant, by whose negligence an airman of the Royal Australian Air Force had been injured, certain sums which the Commonwealth had either paid to the airman or had paid out for his benefit as follows: £108 8s paid to the airman for his services from the time of injury to the date of his discharge, during which period the airman performed no services; £286 2s 1d being the value of hospital treatment furnished by the Commonwealth to the airman prior to his discharge; £72 19s 7d being the value of hospital treatment furnished to the airman after his discharge; £60 4s being the amount of the pension paid to the airman after his discharge and still being paid at the time of trial; and £1 19s 7d being the value of items of clothing worn by the airman at the time of his injuries but which belonged to the Commonwealth and were destroyed in the accident. There, as in our case, the plaintiff based its right of action on the right of a master to sue for loss of services of a servant due to the negligent act of the defendant. It appeared that the airman had already recovered a judgment against the

same defendant for a sum said not to include the items sued for by the Commonwealth. The Commonwealth was not permitted to recover except for the value of its property, the clothing worn by the airman which was destroyed in the accident. Both in the trial court and on appeal recovery was denied to the Commonwealth and it was held that the relation of master and servant did not exist between the Commonwealth and its air force man and that therefore there was no cause of action. Although not so authoritative as the opinions on appeal, we recommend the opinion of the judge of the Supreme Court who tried that case as a learned discussion of the entire subject and a comprehensive review of the authorities and the reasons for his conclusions. The opinion points out that in the case of *Attorney General v. Valle-Jones*, 2 K. B. (1935), 209, counsel admitted and the judge therefore assumed that the relation of master and servant subsisted between the Crown and the airman and therefore the court never decided the question at all. This failure of the trial court in the *Valle-Jones* case to pass upon the nature of the relationship existing between the government and the members of its armed forces is also noted and commented upon in the opinion in the foregoing case of *United States v. Atlantic Coast Line R. Co.*, 64 Fed. Supp. 289.

The Australian case, therefore, is squarely in point on the matter at issue here and the courts there reached a conclusion identical with that announced by the Circuit Court of Appeals in the case at bar. So far as diligent search has disclosed, it is the only case in the United Kingdom involving a cause of action identical with that sued upon by the plaintiff in the case at bar in which all the aspects of the action are analyzed, considered, and decided.

In the trial court the plaintiff proceeded upon a sort of dual theory to the effect that the relation of master and servant existed between the plaintiff and the injured soldier; or, if not, then in any event a status existed which bore certain simliarities to the relation of master and servant and therefore the action ought to be allowed. The learned trial judge, both in his opinion and in the findings, discarded the master and servant doctrine and adopted the theory that the relation was a status which might be called a "government and soldier relation" and then concludes that by reason of this status, a right of action in the plaintiff exists. The only portion of the findings dealing with this particular matter is paragraph III thereof, in which it is found that the soldier, John Etzel, was "a member of the Army of the United States of America." [Record, p. 28.]

But it will not do, we think, merely to call the relation between the government and a soldier a status and conclude that therefrom a cause of action arises. The failure of such reasoning and argument is pointed out by the judge of the Supreme Court at Brisbane in the case of the *Commonwealth v. Quince*, heretofore referred to, where he says:

> "I think it is not competent for a judge to invent a new liability arising out of some status which is not that of parent and child or husband and wife merely because that status in some way resembles the relationship of master and servant."

If the fact that a status exists is to be of controlling effect, then what is to be said of several other varieties of relations which closely resemble the relationship of master and servant, perhaps even more closely than that

of the relationship of the government and its soldier? For instance, the status of principal and agent. Here substantially the only difference between the relation of principal and agent and the relation of master and servant is the absence of complete control in the principal over the activities of the agent. Otherwise the analogy between the two is substantially identical. They both arise out of contracts of employment under which the principal on the one hand and the master on the other pays to the agent or to the servant certain wages or salary. The agent in the one case and the servant in the other are subject to the direction of the principal or master in fulfilling the terms of the employment. In spite of the close resemblance of the two relationships, it has never been supposed, so far as we are aware, that any valid claim can be made by a principal against a third person on account of injuries sustained by the agent which impair or destroy the agent's ability to fulfill his contract of employment with the principal. Nor do we apprehend that this rule would be changed even if the principal had agreed with the agent to continue the latter's salary during a period of disability occasioned by an accident.

Mention might also be made of the status of partners which might be described as a sort of mutual employment, each by the other. Each works for the other's benefit and each, in effect, pays the other for his services. But we do not think it has ever been asserted that one partner has a cause of action against a third person arising out of injuries to the other partner which destroy or impair his ability to work.

If one examines critically the relation of a soldier to his government, it becomes at once plain that while there are points of resemblance with the relation of a servant

to his master, these points of resemblance are few and the points of dissimilarity are very many. Perhaps the main points of resemblance are that the soldier does perform certain services and he does receive certain pay therefor. The points of dissimilarity are, however, so numerous that it would scarcely be possible to name them all without overlooking some. We shall refer to some of them which are most apparent. While there is an agreement or contract of sorts between the government and the soldier, it is not a contract of employment but is a contract which changes the status. The Supreme Court of the United States has so declared in *In re Grimley*, 137 U. S. 147, 151. The agreement must be entered into by the soldier whether he desires it or not. Indeed, in the instant case, the soldier, John Etzel, was a draftee—not a volunteer—and became a soldier merely because the law required him to report for induction. [Record, p. 34.] So far as appears, he may have profoundly desired to remain out of the army. In any event, he had no choice. The soldier has no part in fixing the terms of his enlistment nor of the services which he is to perform. He has no right to bargain as to wages or salary. He takes whatever the government gives him. He does not receive wages comparable to private employment. He cannot quit if he becomes dissatisfied. He must serve so long as the government desires to retain him. He cannot strike. He has nothing to say as to the kind of food he shall eat nor the sort of clothes he shall wear. He can be discharged at any time, even against his will and

without the government's incurring any liability for damages. For injuries negligently inflicted by another soldier or through the furnishing to him of defective equipment, he has no cause of action against the government, although the government may, and usually does, make certain provisions for disability payments or pensions in the event of injury. While he is not liable to a suit for damages at the hands of the government for failure properly to perform his duties, he may be punished, cast into jail, and if the offense be serious enough, his life may be forfeited. He is practically not a free agent at all. He does, eats, and wears whatever the government may say he shall do, eat, and wear and at such times, places, and under such circumstances as the government may choose. Nor do we think it has ever been supposed that the soldiers of the United States were entitled to any benefit under Workmen's Compensation Laws. Such are some of the differences in the relation of a soldier to his government as compared to the relation of a servant to his master. We make no claim that this list is all inclusive. Other important differences may and probably do exist.

For all these reasons, we respectfully assert that the relation of master and servant did not exist as between the plaintiff and the soldier John Etzel and that unless the courts are to invent a new cause of action based not upon the master and servant relation, then the plaintiff has no cause of action for damages against the defendants and respondents.

II.

Even if the Relation of Master and Servant Could be Supposed to Exist Between the Petitioner and the Soldier, No Cause of Action Rests in the Petitioner to Recover From a Third Party, Such as Respondents, the Money Paid by Petitioner to the Soldier for His Compensation as a Soldier During the Time He Was Incapacitated Nor for the Money Paid by Petitioner for the Hospital Expenses of Such Soldier.

Quite apart from the question heretofore discussed in this brief respecting the right or lack of right of the plaintiff to recover at all against the third person who has negligently caused personal injuries to the soldier, is the question as to what recovery may be had, if a right of action exists; that is, what is the measure of damages so far as the master is concerned? To this question we now direct attention.

It has already been pointed out that under Section 49, subdivision c, of the California Civil Code, the right of action there contemplated is one which accrues from an injury to a servant "which affects his ability to serve his master." In other words, the damages accruing to the master arise by reason of loss of service. This right of action is, of course, quite different from the right of action which the injured employee has against the third person as a result of the tortious injury.

A claim for damages for personal injuries belongs exclusively to the person injured. (*Franklin v. Franklin*, 67 Cal. App. (2d) 719.)

Such claim by the injured person consists of his right to recover (a) for his injuries, including detriment to his

health and physical capacity, and for physical suffering; (b) for loss of time, and in this respect his earning capacity is a proper element to be considered; and (c) for the reasonable expense of medical and hospital treatment and care. (*Campbell v. Los Angeles Traction Co.*, 137 Cal. 565, 568, 70 Pac. 624; *Hoffman v. Lane*, 11 Cal. App. (2d) 655, 106 Pac. 113; *Dewhirst v. Leopold*, 194 Cal. 424, 433, 229 Pac. 30; *Graeber v. Derwin*, 43 Cal. 495.)

Many other cases could be cited but these are sufficient for illustration.

Such claim resting in the injured person is not subject to assignment by him, nor to transfer by agreement, nor by operation of law, as by subrogation. He, and he alone, can recover. (*Franklin v. Franklin*, 67 Cal. App. (2d) 719; *Cassetti v. Del Frate*, 116 Cal. App. 255, 257, 2 P. (2d) 533; *Adams v. White Bus Line*, 184 Cal. 710, 195 Pac. 389; *Jackson v. Deauville Holding Company*, 219 Cal. 498, 27 P. (2d) 643.)

So, also, at common law two actions lie for personal injuries to married women, infants, and servants; one by the husband, father, or master for the loss of service, and the other by the husband and wife, the infant, or the servant for the personal injury. (*Lang v. Morrison*, 14 Ind. 599; *Bartley v. Richtmyer*, 4 N. Y. (Comstock) 38.)

In California, by statute (Code of Civil Procedure, Section 376), the father is given the right to maintain an action for an injury to his minor child. At Common Law that right was predicated upon the fiction that the infant was the servant of his father. It is true that in actions by a father for injuries to his minor child, the father, by reason of the parental relation and the inher-

ent liability resulting therefrom to care for, maintain, and support the child and by reason of the father's inherent right to receive the earnings of the child, is permitted to recover the pecuniary value of the child's services and also the cost of the child's medical and hospital treatment. A somewhat similar doctrine seems to have prevailed at Common Law with reference to apprentices and other menial servants who become a part of the master's family and to whom he stood in *loco parentis*.

Respecting a master and servant, however, we suggest that it is the doctrine generally held in the United States, both under the California Statutes and under the Common Law, that the two rights of action, one by the servant and the other by the master, are separate and distinct and do not overlap, and that in the servant rests the right of action for all his personal injuries, including his lost earnings and the expense of his hospitalization, whereas in the master rests only such damages as he may have sustained by reason of the loss of the services of his servant.

We have already pointed out that under California law the injured soldier, John Etzel, had a right of action for his personal injuries, his lost earnings, and his medical expense. This cause of action he had settled and compromised and in evidence of that settlement and compromise had given a full and complete release, which was introduced in evidence and marked Defendants' Exhibit "A." [Record, p. 9.] We have, then, in this case an anomalous situation of the plaintiff suing for two of the items of damage, to-wit: wages and costs of hospitalization which rested only and solely in John Etzel, the injured soldier. The plaintiff does not seek to recover any loss which it sustained by reason of the inability of

the soldier to perform his work as a soldier. In fact, it does not appear under the evidence that the plaintiff sustained any damage because the injured soldier was unable to perform his duties for a period of twenty-nine days. The plaintiff, in other words, attempts in this case to measure its damages by certain items of damage which belonged to the injured soldier and to him alone. This situation is adverted to in the case of *Commonwealth v. Quince,* which we considered at length in the foregoing section of this brief. In that case, quoting with approval from *Johnson v. Royal Mail Steam Packet Co.* (1867), L. R. 3 C. P. 38, at page 43, it is said:

> "the damages must be measured by the value of his services which were lost, not by the incidents of his remuneration under the terms of his contract of employment; * * * A master cannot count as part of his damage by the loss of his employee's services sums which he has to pay because his contract of employment binds him to pay wages to his servant while alive and a pension to his widow when he is dead."

How, then, can there be any valid legal basis for plaintiff's claimed right to recover these items of damage, since the right of recovery rested in the injured soldier? It cannot be upon any theory of assignment or transfer because, as we have already pointed out, the authorities state definitely that such a claim of an injured person is not subject to assignment nor transfer by agreement. It cannot be on any theory of transfer by operation of law or by subrogation, for likewise the authorities are plain that such a claim of an injured man is not subject to assignment by operation of law or by way of subrogation. He, alone, has the right of action for his lost wages and

hospital expenses and he, alone, can enforce the same. When he executed his release, he satisfied the entire claim.

Then, too, it is the law in California that such a cause of action for damages for personal injuries cannot be split and recovered partly at one time and partly at another. (*Kidd v. Hillman*, 14 Cal. App. (2d) 507, 58 P. (2d) 662.) This case, in some respects, is not unlike the case at bar. The plaintiff brought an action for damages to person and property resulting from an automobile accident caused by the defendant's negligence. In this action, she obtained a judgment and executed a release to the defendant of all liability. Subsequently, another action was brought for damages to her automobile upon the theory that the insurance company, having indemnified her for the damage to her machine, had become subrogated to her right of action and therefore should be permitted to recover for the damage to the automobile. It was held that the release signed by the plaintiff was binding on the insurance company; that the cause of action for damages arising out of the action could not be split, and that in this respect the insurer was in no better position than the insured. The action was barred both by the release and by the rule forbidding the splitting of the cause of action.

See, also, to similar effect:

Grain v. Aldrich, 38 Cal. 514, 519;

Van Horne v. Treadwell, 164 Cal. 620, 622, 130 Pac. 5;

Herriter v. Porter, 23 Cal. 385.

Authorities elsewhere in the United States are persuasive against there being any right of recovery in an employer for such items as those for which the plainitff sues in the case at bar. (*Interstate Telephone & Telegraph Co. v. Public Service Electric Co.*, 86 N. J. Law, 26, 90 Atl. 1068.)

This case discusses generally the question as to whether an employer has any right to recover wages and medical bills paid to or for an employee and answers the question in the negative, pointing out that what the employer loses is the value of the services to him and that what the plaintiff employer there was seeking to recover was the value of the services paid to the employee.

So, also, in the case at bar the items of wages which the petitioner seeks to recover is the "value of the services to the employee," if he be presumed to be an employee for the sake of the argument.

City of Philadelphia v. Philadelphia Rapid Transit Company, 337 Pa. St. 1, 10 A. (2d) 434. In this case it appears that certain firemen, employees of the plaintiff, had been injured by the negligence of the defendants. The firemen brought a separate suit against the defendant, and recovered judgments aggregating $25,000. In these suits, they made claim for loss of wages and cost of medical care but offered no evidence thereof. The city, under compulsion of Pennsylvania statutes, continued to pay full wages to the firemen during their disability and also all medical and hospital bills occasioned by the injuries, the total sum aggregating in excess of $6000. The city then brought this suit to recover from the defendant the amount of such payments. It was held that the city could not recover and the court adverts to the

rule which we have shown prevails in California to the effect that the right to recover lost wages and medical bills rests in the injured employees and might have been enforced in the employees' action and that the law does not permit of the splitting of an action between the employees and the employer. The court points out that no attempt was made to establish expense of the city's loss by reason of the incapacity of the firemen. The same situation exists in the case at bar.

Chelsea Moving & Trucking Co., Inc. v. Ross Towboat Co., 280 Mass. 282, 182 N. E. 477. In this case the plaintiff employer had continued to pay to his employee, as provided for in a contract with the employee, the amount of the latter's wages during the time he was laid up by reason of the injuries tortiously inflicted by the defendant. The plaintiff sued for this payment. The case is important because it discusses the rule as applicable to master and apprentice and parent and child and denies any right of recovery in the plaintiff employer for the wages paid, saying that the loss of wages was a part of the injury which the injured employee sustained.

See, also, *Northern States Contracting Company v. Oakes*, 191 Minn. 88, 253 N. W. 371, holding that a contractor cannot recover from a sub-contractor for increased workmen's compensation insurance premiums which the contractor was compelled to pay in consequence of an employee's death caused by the sub-contractor's negligence as this was a too remote and indirect result of a wrongful act.

Closely akin to the foregoing cases and involving the same general rule of law are the following cases which support the general rule that a tort to one person does not

make a tort feasor liable to another person merely because the injured person was under a contract with that other. *Robins Dry Dock & Repair Co. v. Flint*, 275 U. S. 303, 72 L. Ed. 290; *The Federal No. 2*, 21 F. (2d) 313 (C. C. A. 2d); *The Toluma*, 72 F. (2d) 690, 693; *Brink v. Wabash Railroad Company*, 160 Mo. 87, 60 S. W. 1058; *Connecticut Mutual Life Insurance Company v. New York & New Haven Railroad Co.*, 25 Conn. 265; *Byrd v. English*, 117 Ga. 191, 43 S. E. 419.

It is pointed out in the case of *The Federal No. 2*, above cited, in which an attempt was made by a master to recover hospital expenses which he had paid for his employee in consequence of a tortious injury to the latter, that if the employee make settlement of his claim, that, in any event, would put an end to the matter. In any event, there was no cause of action.

It is implicit in the argument on behalf of petitioner that since the government paid the injured soldier his compensation while he was laid up and also paid his medical expenses, this in some manner, not exactly explained, took away from the injured soldier any right on his part to recover these items from the defendant and the assumption was sought to be made by this that the right passed to the petitioner.

This argument that the master may recover for hospital expenses and wages is made at the bottom of page 12 of the petition and on page 13 certain authorities are cited as bearing this out. We shall examine them briefly.

The first is *Cooley on Torts*, 4th Ed., Section 180. The text referred to is a brief statement to the effect that wrongs which a master may sustain "are substantially confined to being deprived of services." Then follows the

statement that connected with this may be incidental damages such as expenses of care of the servant when the loss is occasioned by some violence to the servant so that this care devolves upon the master. This statement in the text is not supported by the citation of even a single case and it is followed by the somewhat significant statement that the principles which govern the recovery had been sufficiently indicated in that part of the text dealing with parent and child, thus indicating that the learned author is perhaps confusing the right of a parent to recover for the expense of the care of his child with the action of a master to recover for loss of services. Certainly, in California these two actions are separate and distinct, one provided for in Section 49, subdivision c, of the Civil Code covering the right of a master to bring an action for injury to his servant "which affects his ability to serve his master," and the other provided for in Section 376 of the Code of Civil Procedure giving the father the right to maintain an action for injuries to his minor child.

The next case cited is *Attorney General v. Valle-Jones,* upon which we have already commented and in which the question here at issue went by default.

The next case of *Smaill v. Alexander,* 23 N. Z. L. R. 745, is the only one cited by petitioner tending to support the argument in the petition. As is noted, it arose in New Zealand and from the opinion it appears that the master was permitted to recover medical expenses incurred for a servant injured by the assault of the defendant. The statement is made in the case that if the master could not recover, it would follow that the wrongdoer would not be liable to anyone for the costs of medical attendance for the reason that the injured man could

not recover because he had never paid them. This statement, however, is contrary to the majority rule in the United States, as we have shown elsewhere in this brief.

The next case is *Dixon v. Bell*, 1 Stark 287. This, again, was an action by a father for loss of services of his son and medical expense and was not an action by a master.

The next citation is *Reeve Domestic Relations* (4th Ed. 1888) 487. The text on page 487 has nothing to do with the matter under consideration. It involves the right of a master to recover damages for the enticement of his servant. However, in the next preceding page—that is, page 486 of the text, the author here considered the right of a master to recover where his servant has been injured and this text definitely supports the view for which we have been arguing, indicating that the master may have a right of action in the case of slaves, apprentices, and children, then saying:

> "But in case of a hired servant, the servant must ultimately be at all the expense himself; and such expense will be a part of the damages which belong to him. If the beating be such as occasion no loss of services, the master is not entitled to recover anything."

The next and last case cited is that of *Woodworth v. Washburn*, 2 Denio, 369, 374. No question of medical or other expense was involved. The sole and only question decided was whether the plaintiff could recover for loss of services of his hired man who was by the defendant locked in the latter's bank for about thirty minutes. The plaintiff recovered six cents damages in the Justices' Court, which judgment was reversed by the Court of Common

Pleas but was restored by the opinion of the Supreme Court. There is dictum in the case to the effect that a master may recover consequential damages where the injury is done to his slave, servant, apprentice, or minor child when the master stands in the place of a parent. *Reeve Domestic Relations* above referred to shows that this rule does not apply to hired servants.

We have already shown that the right to recover lost earnings and medical and hospital expense rested in the injured soldier and that he could not by assignment, subrogation, or operation of law transfer such right to anyone else.

Furthermore, it is not the law, as we understand it, that lack of legal obligation on the part of the injured person to pay for medical and hospital expenses deprives him of his right to recover the reasonable value thereof. Nor is it the law that the continued payment to the person injured of his lost wages during his period of disability either by his employer or someone else or the discharge of the bills for the injured person's medical and hospital treatment by his employer or someone else, takes away from the injured person the right which the law places in him to recover such items of damage from the tort feasor. It is, we believe, the majority rule in the United States that an injured person may recover the reasonable value of his medical and hospital treatment, as well as lost wages, even though someone else has paid for the medical care and even though the injured person's employer has continued to pay his wages.

The rule is thus stated in Volume 4 of Restatement of the Law of Torts, page 633, Section 924, clause c:

> "The damages are not reduced by the fact that the plaintiff has suffered no net financial loss as the re-

sult of the entire transaction, as where he receives insurance money or an amount equal to his lost wages from his employer or from a friend (see §920, Comment e)."

See, also, in the same Volume, Section 920, subdivision , at page 620, which is to the same effect.

The rule thus stated in the Restatement of the Law is supported by the authorities.

In the case of *Cunnien v. Superior Iron Works Company, et al.*, 175 Wis. 172, 188, 184 N. W. 767, the Supreme Court of Wisconsin states the rule as follows:

> "It also seems to be the prevailing doctrine in this country that, where the salary of an injured person is continued by his employer during the time of his inability to perform services, such payment is no ground for diminution of the damages to be paid by the one who has caused the injury."

There is a note to this case in 18 A. L. R. 678, citing numerous cases to the same effect. The case is, further, very pertinent here because it involved the right of a member of the Naval Forces of the United States to recover for lost wages notwithstanding payment of wages and compensation to him by the Navy. The injured plaintiff was hurt in an automobile accident due to the negligence of the defendant. He was paid by the United States certain sums under the terms of Government Statutes during his period of disability. The jury found that his lost earnings amounted to $1500. The trial court, in its judgment, deducted this $1500 from the total of the damages as fixed by the jury on the theory that the government had already paid the injured plaintiff for his lost earnings. The Supreme Court held that this

was improper and that judgment should have been rendered for the full amount by the jury.

See to similar effect:

Wood v. Ford Garage Co., 162 Misc. 87, 293 N. Y. Supp. 999, 1003; affirmed 252 App. Div. 921; 300 N. Y. Supp. 1358;

Shea v. Rettie, 287 Mass. 454, 192 N. E. 44, 95 A. L. R. 571;

Gatzweiler v. Milwaukee Electric Railway & Light Company, 136 Wis. 34, 116 N. W. 633;

Harding v. Town of Townshend, 43 Vt. 536.

All of the foregoing cases support the rule that the mere fact that an injured employee has received wages from his employer or compensation by insurance or accident policy is no ground for diminution of the damages which should be paid to him by the tort feasor.

The California authorities also lend support to the majority rule mentioned above and hold in general that the wrongdoer should not be permitted to profit by any payment by others to or for the injured person.

Gastine v. Ewing, 65 Cal. App. (2d) 131, 150 P. (2d) 26;

Loggie v. Interstate Transit Company, 108 Cal. App. 165, 291 Pac. 618;

Benach v. Market Street Railway Company, 29 Cal. App. (2d) 641, 647;

Reichle v. Hazie, 22 Cal. App. (2d) 543, 71 P. (2d) 849;

Purcell v. Goldberg, 34 Cal. App. (2d) 344, 93 P. (2d) 578.

From the authorities cited and for the reasons above set forth it is apparent that the right of action for lost wages and medical expenses rested in the injured man and not in the plaintiff, and that such right of action was not transferable by the injured man to the plaintiff, or at all, either by assignment or operation of law. Therefore, even if the injured man had not released his cause of action by the complete settlement which he made, nevertheless the plaintiff has not and cannot have any cause of action for the items sued for.

The trial court in its opinion relies for authority largely upon the foregoing cited English case of *Attorney General v. Valle-Jones* in its conclusion that Etzel, the injured soldier, had no right to recover for lost wages and hospital expenses. We have shown that in the United States the rule is otherwise and that the injured person continues to enjoy the right of recovery notwithstanding payment by his employer of wages and hospital expenses, the basis of the rule being that the tort feasor is not entitled to profit by reason of moneys which have been paid out by others for the benefit of the injured person. In England, however, a contrary rule seems to prevail and there a tort feasor is entitled to the benefit of payments received by the person injured as a bounty, pension, or under contract. See Note in 95 A. L. R. 580; 18 A. L. R. 688. An English case, therefore, is a poor basis upon which to rest any conclusion concerning this particular matter.

We respectfully suggest that for all the reasons heretofore stated, the District Court erred in its conclusions,

that the reversal of its decision by the United States Circuit Court of Appeals was correct and that under no applicable law, whether federal law, California law, or common law, is there any right of recovery in the petitioner by reason of the relation existing between the petitioner and the soldier, nor in any event is there any right of recovery for the particular items sued for, and that therefore the petition for writ of certiorari should be denied.

Respectfully submitted,

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Attorneys for Standard Oil Company of California and Ira Boone.

IN THE

Supreme Court of the United States

October Term, 1946.

No. 235.

THE UNITED STATES OF AMERICA,

Petitioner,

vs.

STANDARD OIL COMPANY OF CALIFORNIA AND IRA BOONE,

REPLY BRIEF FOR STANDARD OIL COMPANY OF CALIFORNIA AND IRA BOONE.

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

STATUTES

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Statement of Case.

In the interest of exactness and clarity and in order that there may be no possible misapprehension as to the precise nature of the relief originally sought by the United States or of the precise nature of the trial court's findings upon which the judgment was based, we make certain additions to the Statement of the Case as set forth in petitioner's brief.

In paragraph VIII of the complaint [Tr. p. 4], the plaintiff alleged three things which were claimed to constitute the loss suffered by plaintiff as a result of the injuries to the soldier, John Etzel: (1st), that the services of John Etzel were lost to the plaintiff during the time he was incapacitated; (2d), that the plaintiff became

liable to pay, and did pay, to John Etzel his compensation during said period of incapacity; and (3d), that the plaintiff expended for hospital care a certain sum during said period of incapacity. At the trial no proof was made nor offered as to what was the value of the services of John Etzel to the plaintiff.

In response to these allegations, the court found in paragraphs VI and VII of the Findings [Tr. pp. 29, 30] that John Etzel was incapacitated and his services as a member of the Armed Forces were lost to plaintiff for the period alleged; that the plaintiff was obligated to pay, and did pay, to John Etzel wages during his incapacity in the sum of $69.31 and that said last mentioned sum was the fair and reasonable value of the services lost by plaintiff during Etzel's period of disability. There was no evidence offered to prove this last finding or upon which it was or could be based. As we shall hereafter point out, the compensation accruing to Etzel during his disability constituted *his* loss of earnings. The foregoing finding was an attempt to measure the plaintiff's loss, if any, in the loss of earnings of the injured man. This left the hospital expenses, and as to these, the court merely found that the plaintiff was obligated to, and did, provide them and that the sum paid was the fair and reasonable value of the hospitalization furnished. The findings frankly and properly recognized that hospitalization forms no part of the value of the services lost by plaintiff. Under the findings, they could not be because the court found that the wages paid to Etzel was the fair value of the services lost by plaintiff.

We point out also that this action was initiated upon the theory that the soldier, John Etzel, was the servant

of the plaintiff. Thus, in paragraph III of the complaint [Tr. p. 2] it was alleged that John Etzel was "an enlisted man in the armed forces of the United States government, and the servant of the plaintiff." Again, in paragraph VIII of the complaint [Tr. p. 4] it was alleged that at the time of the accident and prior thereto "John Etzel, the servant of the plaintiff, was an able bodied man," etc. This basic premise that John Etzel was a servant of the plaintiff was implicit and apparent in the presentation and argument of this case in the District Court but was rejected by the trial judge in his opinion and also in the findings. The trial judge declined to find that the injured soldier was a servant of the plaintiff [Tr. p. 28]. Although paragraph III of the findings above cited contained a note stating that the finding that the soldier was a servant of the plaintiff was stricken at the request of counsel for defendants, this is not strictly accurate. The opinion of the trial judge had indicated quite definitely that his conclusion was based merely upon the status which existed between the injured soldier and the government and that he did not subscribe to the master-servant theory. By letter addressed to the trial judge [Tr. p. 26], the above mentioned difference between the findings as originally prepared and the conclusions reached in the trial court's opinion was pointed out and inquiry was made whether the court desired to incorporate a specific finding of master-servant in the findings of fact. Thereupon, the change was made in paragraph III of the findings.

We have, therefore, in this case the rather odd situation of an action originally begun based upon the theory that the relation of master and servant existed between the

injured soldier and the plaintiff—a theory now abandoned. This theory was not accepted by the trial court (in which conclusion we think he was undoubtedly correct) but instead of accepting the master and servant doctrine, the trial court adopted the theory that a status existed between the government and the soldier and that by reason of that status a right of action, heretofore unknown, was created (in which conclusion we respectfully suggest that the Honorable Court was in error).

Presently, therefore, this case has developed so that it necessitates the effort upon the part of the plaintiff to persuade this court to adopt the trial court's theory and to create a new cause of action where none was ever supposed to exist before in this country, based merely upon the premise that a status exists between the plaintiff on the one hand and its soldiers on the other. Under this theory, it would become necessary to disregard the laws of California within the borders of which there occurred the original tort giving rise to a cause of action in the injured man, John Etzel, for damages against the defendant. It would likewise become necessary to ignore the fact that the case was tried within California and presumably under California laws, which unquestionably would permit no recovery by the plaintiff in this action. In short, it becomes necessary for this court to establish a new cause of action unknown to California law, unknown so far as research has discovered, to the other states of the Union, and based upon the claim that even though the master-servant relation does not exist (and the trial court did not find that it did), and even though there is

no federal nor other law warranting it, yet, nevertheless, merely because a so-called status exists between the plaintiff on the one hand and its soldier on the other, therefore the plaintiff ought to have a cause of action.

We proceed, therefore, to examine the applicable law under the following general outline:

1. When the United States goes into court, it does so in general on the same basis as any other litigant and its rights must be determined in the same way and under the same rules as those of any other litigant.

2. The relationship of master and servant does not exist between the government and its soldiers; and in the absence of such relationship no cause of action exists in the instant case for recovery for loss of servi

3. Not only under California law but generally throughout the United States, it is the rule that an injured person has a cause of action against the tort feasor for his lost wages and hospital expense. This action does not rest in the master even though the latter, by reason of contract or otherwise, may have reimbursed his servant for his lost wages and hospital and medical expense. This cause of action of the injured soldier, John Etzel, was satisfied by the payment made to him and was by him released.

I.

When the United States Goes Into Court It Does so in General on the Same Basis as Any Other Litigant and Its Rights Must Be Determined in the Same Way and Under the Same Rules as Those of Any Other Litigant.

It is pointed out by the opinion of the Ninth Circuit Court of Appeal in the instant case that the general rule is that when the United States goes into court to assert a claim it stands on the same footing as any private suitor. Citing *United States v. The Thekla*, 266 U. S. 328, 339, 340; and *United States v. Moscow-Idaho Seed Company*, 92 F. (2d) 170, 173, 174.

This general principle has been enunciated not only in the above cases but in a long line of decisions over a period of many years. The following are some of them:

Curtner v. U. S., 149 U. S. 662;

United States v. San Jacinto Tin Company, 125 U. S. 273;

Cotton v. United States, 11 Howard 229, 13 L. Ed. 675;

United States v. Bank of the Metropolis, 15 Peters 377, 392;

United States v. State National Bank of Boston, 96 U. S. 30.

In the foregoing case of *Curtner v. U. S.*, 149 U. S. 662, in which the United States sought to annul certain listings and certification of lands, the opinion quotes as follows from *United States v. San Jacinto Tin Company*, *supra*:

"But we are of opinion that since the right of the government of the United States to institute such

a suit depends upon the same general principles which would authorize a private citizen to apply to a court of justice for relief against an instrument obtained from him by fraud or deceit, or any of those other practices which are admitted to justify a court in granting relief, the government must show that, like the private individual, it has such an interest in the relief sought as entitles it to move in the matter. If it be a question of property a case must be made in which the court can afford a remedy in regard to that property;".

In the foregoing case of *Cotton v. U. S.*, 11 Howard, 229, it is said:

> "As an owner of property in almost every state of the Union, they have the same right to have it protected by the local laws that other persons have."

Again, in the above cited case of *United States v. Bank of Metropolis*, 15 Peters 392, it was held that when the United States become a party to negotiable paper, they have all the rights and incur all the responsibilities of other persons who are parties to such instruments.

Again, in the above cited case of *United States v. State National Bank of Boston*, 96 U. S. 30, it is said concerning an action involving money which had been paid into the United States Treasury by means of a fraud to which a government agent was a party:

> "In these cases, and many others that might be cited, the rules of law applicable to individuals were applied to the United States. Here the basis of the liability insisted upon is an implied contract by which they might well become bound in virtue of their corporate character. Their sovereignty is in nowise involved."

The case of *United States v. Moscow-Idaho Seed Company*, 92 F. (2d) 173, 174, cited in the opinion below of the Ninth Circuit Court of Appeals, is interesting because it also involves a tort case arising out of an automobile collision. There the United States brought suit as plaintiff in an automobile damage case, claiming damages to the automobile of the United States driven by one of its employees, and the court held that the issue should be determined in accordance with rules of law applicable between private litigants.

We believe that the doctrine enunciated in the foregoing cases constitutes the broad, general rule applicable to suits when the United States come into court as a plaintiff. Thus, in Corpus Juris, Volume 65, page 1409, section 183, it is stated that the rights of the United States are ordinarily measured by the same rules as those of a private litigant, and when it brings an action on behalf of a private party it has no higher right than such party.

The cases cited on page 22 of Petitioner's Brief do not affect the general principle but merely illustrate certain exceptions. They do not overturn the case of *Erie v. Tompkins*, 304 U. S. 64 in its decision that federal courts will follow the state courts in the latter's decisions concerning state law. Nor do they overturn the general rule stated above that the United States as a plaintiff stands on the same footing as any other litigant. In each and every one of them, there was involved either the sovereignty of the United States or some specific federal law or treaty which had to be enforced. Thus, in *Board of Commissioners v. United States*, 308 U. S. 343, there was involved the right of the United States to recover,

on behalf of an Indian, taxes, with interest thereon, illegally levied by Jackson County upon the lands of the Indian. The court mentions that the case involves Indian Treaty rights under a certain Indian Treaty and

> "whatever rule we fashion is ultimately attributable to the Constitution, treaties, or statutes of the United States, and does not owe its authority to the lawmaking agencies of Kansas."

Again, in *Deitrick v. Greaney*, 309 U. S. 190, it was held that judicial determination of the legal consequences which flow from acts condemned as unlawful by the National Bank Act involves decision of a federal, not a state question.

In *Royal Indemnity Company v. United States*, 313 U. S. 289, the questions involved were whether the Collector of Internal Revenue had power to release the obligation of a certain bond filed with him by a taxpayer; and if not, whether the United States is entitled to interest on the amount of its claim against the surety. It was held that the power to release or otherwise dispose of the rights and property of the United States is lodged in Congress and that the Collector of Internal Revenue had no such power. As to interest, it was held that while the New York statute fixing a rate of interest was not controlling, it was, nevertheless, a suitable rate to be allowed.

D'Oench, Duhme & Co. v. Federal Deposit Insurance Corporation, 315 U. S. 47. This case cited by petitioner involved the right of the Federal Deposit Insurance Corporation to recover on notes given to an insured bank to enable it to conceal its true condition, which notes, by receipt given therefor, it was agreed would not be called for payment. This was contrary to the policy evidenced

by the Federal Reserve Act and it was held by the decision that the right of recovery should be arrived at in view of the Federal policy to protect the F. D. I. C. and the public funds which it administers against misrepresenttaion as to assets of insured banks.

Clearfield Trust Company v. United States, 318 U. S. 363, merely decided that the rights and duties of the United States on commercial paper which it issues are governed by federal rather than by local law. In this case a check drawn on the United States treasury had been presented to the Treasury and cashed with the name of the payee forged to an endorsement. Even in that case the court says:

> "The United States as drawee of commercial paper stands in no different light than any other drawee. As stated in United States v. National Exch. Bank, 270 U. S. 527, 534, 'The United States does business on business terms.' It is not excepted from the general rules governing the rights and duties of drawees 'by the largeness of its dealings and its having to employ agents to do what if done by a principal in person would leave no room for doubt.'"

United States v. Allegheny County, 322 U. S. 174, involved the immunity of the federal government from taxation. The United States owned certain machinery located in buildings on land owned by another. Allegheny County added the value of the land and machinery and thereby arrived at a total assessment. It was held that whatever the practice might be in Allegheny County, this could not be done for it was in reality levying a tax on the federal government's machinery and this was unlawful.

Lastly, the case of *Holmberg v. Armbrecht*, 327 U. S. 392, was a suit in equity to recover an assessment against

a stockholder of a joint stock Land Bank who had apparently concealed his ownership of any of the stock. It was held that the case concerned not only a federally created right but a federal right for which the sole remedy was in equity and that equity need not follow state statutes of limitation. In fact, the decision calls attention to the fact that even if there had been a federal statute of limitation for bringing suit, nevertheless the time would not have begun to run until after the petitioners had discovered, or had failed with reasonable diligence to discover the alleged deception by the stockholder which formed the basis of the suit.

Thus each and every of the cases cited by petitioner in an attempt to show that in this particular case the United States does not come into court on the same basis as any other litigant, involved either a treaty or a federal statute giving certain rights or involved some federal immunity as to taxation.

No such situation exists here. There is no federal statute giving the United States a cause of action. It is significant and is pertinently pointed out by the Ninth Circuit Court of Appeals, near the end of its opinion in this case, that although Congress has provided in certain other situations, similar to this, that the Government should have certain privileges of assignment or subrogation, nothing of that sort has been done concerning cases such as the one at bar. In the opinion it is said:

> "Furthermore, it seems clear that Congress did not intend that for tortious injuries to a soldier in time of war, the government should be subrogated to the soldier's claims for damages. It will be noted that Congress has provided that the government should have the privileges of assignment or subrogation in

other and somewhat similar situations. In the Federal Employee's Compensation Act, 5 U. S. C. A. §§751-800, it is provided that before benefits may be received the government may require the beneficiary to assign to the government his rights against the negligent party or to prosecute the action in his own name. (See §776.) And by §797 members of the Officers' Reserve Corps and the Enlisted Reserve Corps of the Army are in time of peace made subject to and given the benefits of the Act. Also the World War Veteran's Act, 38 U. S. C. A. §§421-576, makes similar provisions (§502) with regard to any cause of action that a person entitled to benefits may have against a third person. Cf. The Steel Inventor, 36 F. (2d) 399.

> "In our opinion authority for this action should come through legislation, and not from an attempt by the courts either to enlarge the scope of an ancient common law cause of action, or to create a new one."

Petitioner's brief refers to the fact that the National Government derives its authority to raise an army from the federal constitution. This, however, is a far cry from pointing to any federal statute which authorizes such a suit as this when, as we shall hereafter show, no other litigant would be entitled to recover, whether he did or did not sustain the relation of master to the injured person.

It might with equal force be argued that if the federal government should pass a law authorizing universal compensation and medical expenses to injured citizens, then in all such cases of tortious injury to a citizen, and without any legislation authorizing it, the Government would have a right to recover from a tort feasor the amounts expended by it for compensation and medical

expense. After all, a status exists between the government and its citizens just as it exists between the government and its soldiers and no more cogent reason would seem to exist in the one case than in the other why the federal government should have a cause of action without legislation authorizing it. To be entirely accurate it should be recognized that the real status which exists is that between the government and the citizen, for in becoming a member of the armed forces the soldier is merely performing one of the duties which he owes to his government in his status as a citizen.

II.

The Relationship of Master and Servant Does Not Exist Between the Government and Its Soldiers, and in the Absence of Such Relationship No Cause of Action Exists in the Instant Case for Recovery for Loss of Services.

Petitioner seems now to have receded from the position earlier assumed in this case and no longer insists that the relation of master and servant existed between the plaintiff and its injured soldier. This may be due to the fact that the general trend of the decisions seems to be that a soldier is not acting as an employee or servant of his government but is performing his duties in an entirely different capacity. He is performing his general duties as a citizen to defend and protect his country. It is doubtful if any federal case will be found laying down the postulate that the relation of master and servant corresponds to the relationship of the government and its soldiers. Even in the case at bar, the District Court rejected that idea. The question has several times been

considered in the state courts. In the case of *Goldstein v. State*, 281 N. Y. 396, 24 N. E. (2d) 97, there was involved the relation of a state militia man to the State of New York. The state court, after discussing at some length the rights, duties, and liabilities as between the state and its militia or soldiers (as members of the militia are certainly members of the armed forces), reaches this conclusion:

> "It seems clear that one who joins the state militia and is engaged in active service therein is in no sense an employee of the state. He is simply performing a duty which he owes to the sovereign state as a resident and citizen. It makes no difference whether he does that voluntarily in time of peace or in response to the call of the governor in time of trouble."

In Illinois a similar conclusion was reached by the Supreme Court of that state in the case of *Hays v. Illinois Terminal Transportation Company*, 363 Ill. 397, 2 N. E. (2d) 309. There the court says:

> "The relation between the state and those who are in voluntary military service is essentially different from the relation which obtains between master and servant."

A similar conclusion was reached by the Supreme Court of Nebraska in the case of *Lind v. Nebraska National Guard*, 144 Neb. 122, 130, 12 N. W. (2d) 652.

Cogent support is given to these authorities by the opinions of this court in *Selective Draft Law* cases, 245 U. S. 366, and in *United States v. Schwimmer*, 279 U. S. 644, wherein it is in substance held that a citizen, in rendering military services in time of war, is merely performing a duty which rests upon him as one of the obligations of

citizenship. Thus, in the *Selective Draft Law* cases, it is said:

> "It may not be doubted that the very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need and the right to compel it."

It belittles the relation between the Government and its soldiers to say that it is merely the relation between a master and his servants. The relation is something greater and higher than this. The government, on the one hand, is exacting the last high measure of devotion from its citizens when it requests their entry into the army, and, on the other hand, the soldiers are performing the supreme duty of the protection and defense of the nation, at once a privilege and a sacrifice, even, perhaps, to the extent of life itself. Something of this view is set forth at the end of the opinion in the Draft Law cases, referring to the "exaction by government from the citizen of the performance of his supreme and noble duty of contributing to the defense of the rights and honor of the nation as the result of a war declared by the great representative body of the people."

So far as we are aware, whenever the question has arisen in the federal courts of this country whether a soldier is merely a servant and whether the United States, in a case similar to this, is entitled to recover, the answer has been in the negative, except only in the District Court below. Thus, in *United States v. Atlantic Coastline R. Co.*, 64 Fed. Supp. 289, it was held that there was no cause of action in the government to recover the cost of hospitalization, nursing care, and wages paid

to an injured sergeant whose injuries had been caused by the tortious act of the defendant. The opinion holds that the relation existing between the government and the soldier was not that of master and servant and was not such as to give rise to any cause of action in the government to recover its expenditures.

A similar conclusion was reached as to an injured civilian Conservation Corps enrollee in *United States v. Klein*, 153 Fed. 55.

The only opinion, so far as research has discovered, holding that any liability exists is that of the District Court in the instant case where, as we have pointed out, the trial court rejected the master-servant relationship although, in effect, inventing a new cause of action based upon status.

The idea of a master and servant relationship has also been rejected in the British Dominions. In Australia, was decided the case of *Commonwealth v. Quince*; originally decided in the Supreme Court of Brisbane and reported in Queens Law Reporter on August 28, 1943, page 91, and later, upon appeal, the opinions appeared in the Argus Reports, 50 *et seq.* and 68 Comm. L. R. 227. That case is almost identical with this and recovery was denied, except that the Commonwealth was permitted to recover the value of its property, the clothing worn by the airman, which was destroyed in the accident. In the original opinion in that case the following pertinent language appears:

> "I think it is not competent for a judge to invent a new liability arising out of some status which is not that of parent and child or husband and wife merely because that status in some way resembles the relationship of master and servant."

In Canada, to similar effect, is the case of *McArthur v. King* (1943), 3 Ex. C. R. 225. It is pointed out in petitioner's brief that the Canadian Parliament thereafter amended the statutes to provide that a member of the armed forces should be deemed a servant of the Crown. There is no such statute here nor any other statute authorizing, or attempting to authorize, recovery in a case like this.

It seems clear from all the foregoing cases that the relation between the government and its soldiers is merely that relation which exists between the state and its citizens. The soldier is merely performing one of his duties resting upon him as an obligation of citizenship. The induction of John Etzel into the armed services did not change his fundamental relationship to his government. His induction merely put into active effect the obligation then and theretofore existing upon him to bear arms as one of his duties of citizenship and made him for the period of his military service subject to military law and gave him certain rights and privileges.

The relationship which exists between the government and its citizens to bear arms would be as much interfered with by injury to a citizen subject to call to military service as by an injury to one already inducted. Carried to its logical conclusion, the theory upon which the plaintiff here attempts to predicate liability—that is, that a status exists between the government and its soldiers, would necessarily result in the government having a right to recover damages for loss of service of any citizen already registered under the selective Service Act, whether actually inducted or not. We maintain that the government does not have a propetry right in the

obligations of citizenship to bear arms, whether the citizen has or has not been inducted into the armed forces.

No federal status has been cited which gives to the plaintiff a right to bring the instant action or which creates in the plaintiff any cause of action because of the negligence of a tort feasor. If, therefore, a cause of action is to exist it must be discovered in the statutes of California or the decisions of the California courts. (*Erie v. Tompkins*, 304 U. S. 64.) See, also, *West v. American Telephone & Telegraph Co.*, 311 U. S. 223.

Before proceeding to discuss the California statutes and decisions, it may be noted that the only case of similar nature relied upon by the petitioner for support of its position is that of *Attorney General v. Valle-Jones*, 2 K. B. (1935), 209. It was much relied upon by plaintiff in the trial court and with less confidence now. There the Crown was permitted to recover wages paid to and hospital services paid for certain injured aircraftsmen, whose injuries were sustained in an accident caused by negligence of the defendant. That case, however, is of no assistance in attempting to determine what relation exists between a government and its soldiers. The question as to whether the relation of master and servant existed between the Crown and the airmen was neither argued nor decided. That question seems not to have been raised at all by counsel for the defendant. Upon that question the case, in effect, went by default. This is pointed out in the above cited case of *Commonwealth v. Quince*, and also by the opinion in the *United States v. Atlantic Coastline R. Co., supra.*

From the standpoint of logic and reason, if one examines critically the relation of a soldier to his government,

it becomes at once plain that while there are points of resemblance with the relation of a servant to his master, these points of resemblance are few and the points of dissimilarity are very many. Perhaps the main points of resemblance are that the soldier does perform certain services and he does receive certain pay therefor. The points of dissimilarity are, however, so numerous that it would scarcely be possible to name them all without overlooking some. While there is an agreement or a contract of a sort between the government and the soldier, it is not one concerning which the soldier has any choice. The agreement must be entered into by the soldier whether he desires it or not. Indeed, in the instant case the soldier John Etzel was a draftee—not a volunteer—and became a soldier merely because the law required him to report for induction. So far as appears, he might have profoundly desired to escape military service. In any event, he had no choice. The soldier has no part in fixing the terms of his enlistment nor of the services which he is to perform. He has no right to bargain as to wages or salary. He takes whatever the government gives him. He does not receive wages comparable to private employment. He cannot quit if he becomes dissatisfied. He must serve so long as the government desires to retain him. He cannot strike. He has nothing to say as to the kind of food he shall eat nor the sort of clothes he shall wear. He can be discharged at any time, even against his will and without the government's incurring any liability for damages. For injuries negligently inflicted by another soldier or through the furnishing to him of defective equipment, he has no cause of action against the government, although the government may, and usually does, make certain provisions for disability

payments or pensions in the event of injury. While he is not liable to a suit for damages at the hands of the government for failure properly to perform his duties, he may be punished, cast into jail, and if the offense be serious enough, his life may be forfeited. He is practically not a free agent at all. He does, eats, and wears whatever the government may say he shall do, eat, and wear and at such times, places, and under such circumstances as the government may choose. Nor do we think it has ever been supposed that the soldiers of the United States were entitled to any benefit under Workmen's Compensation Laws. Such are some of the differences in the relation of a soldier to his government as compared to the relation of a servant to his master. We make no claim that this list is all inclusive. Other important differences may and probably do exist.

For all of these reasons, we respectfully assert that the relation of master and servant did not exist as between the plaintiff and the soldier John Etzel and that unless the courts are to invent a new cause of action based not upon the master and servant relation, then the plaintiff has no cause of action for damages against the defendants and appellants.

We proceed now to an examination of the law in California and elsewhere respecting recovery by one person because of tortious injuries to another.

In California there are sundry statutes governing rights of recovery in such cases. The statute by which we respectfully assert this case must be judged is Civil Code,

Section 49, subdivision c. This section, so far as pertinent here, reads as follows:

> "The rights of personal relations forbid:
>
> "(c) Any injury to a servant which affects his ability to serve his master, other than seduction, abduction, or criminal conversation."

It may be noted in passing, and to this we shall advert again, that the injury referred to in the section is one "which affects his ability to serve." In other words, the action recognized by this section is an action arising from inability to serve.

Certain statutory provisions in California, in addition to Civil Code, Section 49, give a right of action by one for the injury or death of another. Thus, by section 376 of the Code of Civil Procedure, a right of action is given to a father for the injury or death of a minor child or to a guardian for the injury or death of a ward. Section 377 of the Code of Civil Procedure gives a right of action for death of an adult. Section 375 of the Code of Civil Procedure provides for an action by a parent for the seduction of a female child below the age of legal consent. California Workmen's Compensation Law gives an employer the right under certain circumstances to maintain an action against a third party tort feasor. Aside from the causes of action so provided, there do not appear to be any statutory provisions in California giving a right of action in one person for injuries sustained by another. Certain it is that there is no California Statute specifically granting a right of action to any-

one on account of injuries to a soldier. Therefore, under California Statutory Law, unless a soldier is a servant of the United States and unless the United States is his employer or master within the meaning of the terms "master and servant," there is no statutory provision in California for the maintenance of an action such as this.

It should be noted also that in California the rule of the Common Law that statutes in derogation thereof are to be strictly construed, has no application. The code establishes the law of California respecting the subjects to which it relates, and its provisions are to be liberally construed with a view to effect its objects and to promote justice. (Civ. Code, Sec. 4.) California Civil Code, Section 49, prior to the year 1939, was broader. Prior to that time, the Statutes of California gave rights of action for wrongs arising out of the interference with personal relations in the following instances: the abduction or enticement of a husband from his wife, the abduction or enticement of a wife from her husband, the abduction or enticement of a child from his parent or guardian, the seduction of a wife, daughter, orphan sister, or servant, and an injury to a servant which *affected his ability* to serve his master. (Civil Code, Sec. 49; Cal. Stats. 1905, p. 68.) In 1939, Section 49 of the California Civil Code was amended so as to take away the rights of action which had theretofore existed for the abduction or enticement of a husband from a wife, or of a wife from a husband, or the seduction of a wife, orphan sister, servant or a child over the age of legal consent. Section 49 of

the Civil Code, both before and after its amendment in 1939, was in derogation of the common law. Prior to 1939 it gave to the wife a cause of action for the enticement (alienation of affections) of her husband, which did not exist at common law, and after its amendment in 1939 it took away the right of action for the seduction of a daughter over the age of consent and the right of action for the seduction of a servant both of which existed at common law. The legislature of California thus made clear its intention that a right of action shall arise from the disturbance of personal relationships only in the instances set forth in the statute.

There is, therefore, no room in the California Statutes for a claim for recovery in this case based upon any other relation than that of master and servant.

Elsewhere, and at common law also, the rule was similar. In other words, unless the relation of master and servant existed, there could be no recovery by one person for injuries sustained by another.

Bartley v. Richtmyer, 4 N. Y. (Comstock) 38.

This was an action for damages for seduction of the plaintiff's stepdaughter. Common Law based the right of action for seduction of a daughter upon the theory that the relation of master and servant existed between the father and daughter. In this case it is said (p. 340):

> "When the daughter is of full age, the father is not entitled to her services; and he cannot maintain this action without showing that the relation of mas-

ter and servant actually existed at the time of the injury."

And, again:

"The gist of the action is loss of service."

A little later in the opinion, the court, in explaining the nature of the action, says:

"The courts went to the full length of their powers when they held that the relation of parent and child might be regarded as that of master and servant for the purpose of supporting this class of actions."

The case of *Nickleson v. Stryker*, 10 Johnson (N. Y.) 115, was an action by a father for the debauching of his daughter, who was an adult. As above stated, such an action at common law was allowed only upon the fiction or theory that the daughter was the servant of her father. In this case, the court holds that whereas, if a daughter is a minor, the father's right to her services may be presumed, yet, where a daughter is of age, "she must be in the her father's service, so as to constitute, in law and in fact, the relation of master and servant, in order to entitle her father to a suit for seducing her."

The reason for the rule is stated as follows in the case of *Woodward v. Washburn*, 2 Denio, 369, 374:

"The reason and foundation upon which this doctrine is built seem to be the property that every man has in the service of those whom he has employed, acquired by contract of hiring, and purchased by giving them wages."

Originally, it seems the Common Law gave the master no right of action against a third person for an injury inflicted upon his servant, causing loss of service, except where the servant was a menial one. In other words, the master was held to stand in *loco parentis*.

Burgess v. Carpenter, 2 So. Car. 7.

At Common Law the master had a cause of action for loss of services of a servant because he had a certain property right in the services and it was this property right which the common law sought to protect and which formed the basis of an action.

Tidd v. Skinner, 225 N. Y. 422, 122 N. E. 247.

Thus, it would appear that both under the Common Law and under California Statutory Law, unless the relation of master and servant existed as between the Government and the injured soldier, John Etzel, the plaintiff can have no cause of action for loss of services against a third person arising out of tortious injuries to the soldier.

In California, the right of action which a parent has for injuries to his minor child is not predicated upon Civil Code, Section 49, subdivision c, giving a right of action to a master for injuries affecting a servant's ability to serve but is based upon Section 376 of the California Code of Civil Procedure which gives the father the right to maintain an action for an injury to his minor child. At common law that right was predicated upon the fiction that

the infant was the servant of his father. It is true that in actions by a father for injuries to his minor child, the father, by reason of the parental relation and the inherent liability resulting therefrom to care for, maintain, and support the child, and by reason of the father's inherent right to receive the earnings of the child, is permitted to recover the pecuniary value of the child's services and also the cost of the child's medical and hospital treatment. A somewhat similar doctrine seems originally to have prevailed at common law with reference to apprentices and other menial servants who become a part of the master's family and to whom he stands in *loco parentis*. Such, however, is not the doctrine in California. Respecting a master and a servant, we suggest that it is the doctrine generally held in the United States, both under the California statutes and in other jurisdictions, that there are two rights of action: one by the servant and the other by the master, and that they are separate and distinct and do not overlap and that in the servant rests the right of action for all his personal injuries, including his lost earnings and the expense of his hospitalization, whereas in the master rests only such damages as he may have sustained by reason of the loss of the service of his servant.

It is the general rule that as to married women, infants, and servants, two actions lie at common law for personal injuries: one by the husband, father, or master for the loss of service and the other by the husband and wife, the infant, or the servant for the personal injury. (*Lang*

v. Morrison, 14 Ind. 599; *Bartley v. Richtmyer*, 4 N. Y. (Comstock) 38.)

From all the foregoing, we think it reasonably appears that the relationship of master and servant did not exist between the petitioner and its injured soldier and that, in the absence of such relationship, no cause of action exists either under California laws or in other jurisdictions for recovery for loss of services.

If the theory of petitioner is to be adopted and recovery is to be allowed to the plaintiff because a status exists between the government and its soldier which is in some respects similar to that of master and servant, this means that a new ground for a cause of action is allowed which has not heretofore existed. This is pointed out by the opinion of the Judge of the Supreme Court at Brisbane in the case of *Commonwealth v. Quince*, Queens Law Reporter of August 28, 1943, page 91 (which involved the identical situation at issue here) when he says:

> "I think it is not competent for a judge to invent a new liability arising out of some status which is not that of parent and child or husband and wife merely because that status in some way resembles the relationship of master and servant."

A decision in favor of the plaintiff in this case would have more far-reaching effect than merely to permit a recovery by the plaintiff. If the fact that a status exists which is somewhat similar to that of master and servant is to be of controlling effect, than what is to be said of

other varieties of relations which closely resemble the relationship of master and servant perhaps even more closely than that of the relationship of the government and its soldier—for instance, the status of principal and agent? Substantially the only difference between the relation of principal and agent and the relation of master and servant is the fact that the agent is somewhat more independent in his actions in the course of his employment than is the servant. Otherwise the analogy between the two is substantially identical. They both arise out of contracts of employment under which the principal in the one case and the master in the other employs the agent and servant respectively at a certain wage or salary. The agent in the one case and the servant in the other are subject to the direction of the principal or master in fulfilling the terms of the employment. In spite of this similarity in the two relations, it has never been supposed, so far as we are aware, that any valid claim can be made by a principal against a third person on account of injuries sustained by the agent which impaired or destroyed the agent's ability to fulfill his contract of employment with the principal. Yet, the doctrine argued for and which it is sought to establish as a law in this case would undoubtedly apply to the status of principal and agent.

Mention might also be made of the status of partners where there is a sort of mutual employment, each by the other. Each partner works for the other's benefit and each, in effect, pays the other for his services, but we do not think it has ever been asserted that one partner has a cause of action against a third person arising out of injuries to the other partner which destroyed or impaired his ability to work.

III.

Not Only Under California Law But Generally Throughout the United States, It Is the Rule That an Injured Person Has a Cause of Action Against the Tort Feasor for His Lost Wages and Hospital Expense. This Action Does Not Rest in the Master Even Though the Latter, by Reason of Contract or Otherwise, May Have Reimbursed His Servant for His Lost Wages and Hospital and Medical Expense. This Cause of Action of the Injured Soldier, John Etzel, Was Satisfied by the Payment Made to Him and Was by Him Released.

Quite apart from the question already discussed in this brief respecting the right or lack of right of the petitioner to recover at all against the third person who has negligently caused personal injuries to the soldier, is the question as to what recovery may be had, if a right of action exists; that is, what is the measure of damages so far as the master is concerned? To this question we now direct attention.

We have already pointed out that no evidence was offered to prove the value, if any, of the services of John Etzel, the soldier, to the petitioner. We have also pointed out that without evidence upon which to base the findings, the trial court found that the wages paid by petitioner to the injured soldier were the value of the services lost by petitioner during the injured soldier's disability. We have also adverted to the fact that the wages lost by an injured servant during his disability measures the injured person's loss of earnings rather than the value of the loss of service by the master. We shall refer to this again.

Under Section 49, subdivision c, of the California Civil Code, the right of action there contemplated on behalf of a master is one which accrues from an injury to a servant "which affects his ability to serve his master." In other words, the action is one in which the damages are to be measured by the value of the loss of the service. This right of action given to a master is, of course, quite different from the right of action which the injured employee has against the third person as a result of the tortious injury.

A claim for damages for personal injuries belongs exclusively to the person injured. (*Franklin v. Franklin*, 67 Cal. App. (2d) 717, 155 P. (2d) 637.)

Such claim by the injured person consists of his right to recover (a) for his injuries, including detriment to his health and physical capacity, and for physical suffering; (b) for loss of time, and in this respect his earning capacity is a proper element to be considered; and (c) for the reasonable expense of medical and hospital treatment and care. (*Campbell v. Los Angeles Traction Co.*, 137 Cal. 565, 568, 70 Pac. 624; *Hoffmann v. Lane*, 11 Cal. App. (2d) 655, 106 Pac. 113; *Dewhirst v. Leopold*, 194 Cal. 424, 433, 229 Pac. 30; *Graeber v. Perwin*, 43 Cal. 495.)

Many other cases could be cited but these are sufficient for illustration.

Such claim resting in the injured person is not subject to assignment by him, nor to transfer by agreement, nor by operation of law, as by subrogation. He, and he alone, can recover. (*Franklin v. Franklin*, 67 Cal. App. (2d) 717, 155 P. (2d) 637; *Cassetti v. Del Frate*, 116 Cal. App. 255, 257, 2 P. (2d) 533; *Adams v. White Bus Line*,

184 Cal. 710, 195 Pac. 389; *Jackson v. Deauville Holding Company*, 219 Cal. 498, 27 P. (2d) 643).

It would appear, therefore, that under California law the injured soldier, John Etzel, had a right of action for his personal injuries, the value of the wages which he would have earned and the reasonable value of any necessary hospital or medical expense. This cause of action he had settled and compromised, and in evidence of that settlement and compromise had given a full and complete release, which was introduced in evidence and marked "Defendants' Exhibit A" [Tr. pp. 34, 35].

The only case in California which research has disclosed and which bears upon Section 49c of the Civil Code is that of *Darmour Productions Corporation v. Baruch Productions*, 135 Cal. App. 351, 27 P. (2d) 664. There the master sought only to recover for loss of services. It is interesting to note that the very next case in the same volume of the Reports is *Ann Christy v. Baruch Productions*, 135 Cal. App. 355, 27 P. (2d) 660, which was an action by Ann Christy, the injured servant mentioned in the preceding case, against the tort feasor to recover her damages, and it is discovered upon examination of the Clerk's Transcript on Appeal that she sought to recover not only her general damages but also certain sums covering medical and hospital bills.

We do not intend to suggest that the injured man could successfully release a right of action resting in the United States. What we do suggest is that the right of action for lost earnings and for any hospital expenses rested in the injured soldier and not in the United States and has been by the injured soldier released and discharged. Therefore, to permit the recovery by the United States

in the instant action would, in effect, permit a double recovery for the same thing. If the United States should be held to have any cause of action at all in this case, it must be a cause of action measured by the actual worth of the services of its soldier to the United States. It is not a cause of action measured by what the injured soldier lost in compensation or measured by what his hospital bills were.

Let us consider the situation a little more critically for a moment. John Etzel is injured by the negligence of the defendants. Let it be assumed that he brings an action. Whatever claim he has is undoubtedly to be determined under California law. The tortious injury occurred in California and the claim arises under California statutes. His claim, as pointed out, under California law consisted of three elements: (a) a right to recover for his injuries and physical suffering; (b) for his loss of time, and in this respect, his earning capacity; and (c) for the reasonable expense of any medical and hospital treatment necessary for his proper care. All of these items of damage were a part of John Etzel's claim or cause of action. There can be no doubt of it, either under California law or generally elsewhere. Having this cause of action with these elements, Etzel has a right to compromise and release it. This he did. He had a right to do it. There is no statute preventing it. The defendants had a right to compromise and settle with Etzel. There is no statute preventing such action on their part. This being so, the right to recover was extinguished. Under petitioner's theory, however, what happens to John Etzel's right to claim an element of damage which the law gives him? Is it to be said: "Yes, Etzel had a right to recover lost earnings and medical expense as a part of his

claim for tortious injuries and therefore he had a right to release the entire claim, but the plaintiff also has a right to recover again for the same elements of hospital cost and Etzel's lost earnings?" Or, is it to be said: "Yes, Etzel would have had a right to recover his lost earnings and hospital expenses but they were not lost to him because the United States paid them and therefore the United States may recover?" Such, however, is not the law in California nor generally elsewhere throughout the United States.

In California, the Supreme Court of that state, in a very recent case, that of *Anheuser-Busch, Inc. v. Starley*, 28 A. C. 262, has definitely laid down the rule that where a person suffers personal injury by reason of another's tort, an action against the wrongdoer for the damages suffered is not precluded nor is the amount of the damages reduced by the receipt by him of payment for his loss from a source wholly independent of the wrongdoer. This decision was foreshadowed by numerous earlier California cases:

Loggie v. Interstate Transit Company, 108 Cal. App. 165, 169, 291 Pac. 618;

Reichle v. Hazie, 22 Cal. App. (2d) 543, 71 P. (2d) 849;

Purcell v. Goldberg, 34 Cal. App. (2d) 344, 93 P. (2d) 578;

Peri v. L. A. Junction Railway, 22 Cal. (2d) 111, 113, 130 P. (2d) 441;

Benich v. Market Street Railway Co., 29 Cal. App. (2d) 641, 85 P. (2d) 556;

Inglewood Park Mausoleum v. Ferguson, 9 Cal. App. (2d) 217, 49 P. (2d) 305.

This California rule is, we believe, the majority rule in the United States. It is the rule adopted in Volume 4 of Restatement of the Law of Torts, page 633, section 924, clause c, which reads as follows:

> "The damages are not reduced by the fact that the plaintiff has suffered no net financial loss as the result of the entire transaction, as where he receives insurance money or an amount equal to his lost wages from his employer or from a friend (see §920, Comment e)."

Again, in the same volume, at page 620, section 920, subdivision e, the rule is thus stated:

> "In other cases the damages which he is entitled to recover are not diminished by the fact that either as a matter of a contract right or because of gifts, the transaction results in no loss to him. Where a person has been disabled and hence cannot work but derives an income during the period of disability from a contract of insurance or from a contract of employment which requires payment during such period, his income is not the result of earnings but of previous contractual arrangements made for his own benefit, not the tort feasor's. Likewise, the damages for loss of earnings are not diminished by the fact that his employer or a third person makes gifts to him even though these have been given because of his incapacity. Further, he may be able to recover for the reasonable value of medical treatment or other services made necessary by the injury although these have been donated to him (see §924, Comment f)."

This rule thus stated in Restatement of the Law of Torts is supported by authorities from other states.

In the case of *Cunnien v. Superior Iron Works Company, et al.*, 175 Wis. 172, 188, 184 N. W. 767, the Supreme Court of Wisconsin states the rule as follows:

> "It also seems to be the prevailing doctrine in this country that, where the salary of an injured person is continued by his employer during the time of his inability to perform services, such payment is no ground for diminution of the damages to be paid by the one who has caused the injury."

There is a note to this case in 18 A. L. R. 678 citing numerous cases to the same effect. The case is, further, very pertinent here because it involved the right of a member of the Naval Forces of the United States to recover for lost wages notwithstanding payment of wages and compensation to him by the Navy. The injured plaintiff was hurt in an automobile accident due to the negligence of the defendant. He was paid by the United States certain sums under the terms of Government Statutes during his period of disability. The jury found that his lost earnings amounted to $1500. The trial court, in its judgment, deducted this $1500 from the total of the damages as fixed by the jury on the theory that the government had already paid the injured plaintiff for his lost earnings. The Supreme Court held that this was improper and that judgment should have been rendered for the full amount by the jury. The holding of the court is succinctly stated in the syllabus, as follows:

> "The amount awarded one enlisted in the United States Navy for loss of time because of injury negligently inflicted upon him by a third person should not be deducted from the total amount awarded him as damages for the injury, although he continued for

a time to draw his pay from the government and received an allowance for vocational rehabilitation under the Federal Statutes."

In the case of *Shea v. Rettie*, 287 Mass. 454, 192 N. E. 44, 95 A. L. R. 571, there was involved the right of a police officer to recover from a tort feasor who had injured him damages for his impaired earning capacity, even though such police officer had been paid his wages by his employer, the City of Worcester. It was held that the mere fact that the injured police officer had continued to receive his wages was no ground for diminution of the damages which should be paid by the tort feasor and the court says (p. 458):

"The plaintiffs, who under a contract were entitled to disability payments from the city ought not in reason to be held to be in any other position than if the payments came from an insurance company under a policy providing accident or disability insurance. Heath v. Seattle Taxicab Co., 73 Wash. 177, 131 P. 843. There is no joint relationship between the city whose obligation to the plaintiffs arises under a contract of employment providing for payments to a police officer absent from duty because of sickness or injury due to any cause and the defendant whose obligation originates in his wrongful conduct. The duty imposed by law upon him is to compensate the plaintiffs for all the damage done by his negligence including impairment of earning capacity. That obligation is not fulfilled because it happens that the plaintiffs have a contract with the city which entitles them to be indemnified by disability payments during absence from duty. Compensation for the defendant's wrong is not thereby furnished by the defendant. Such payments by the city do not concern and

should not benefit the defendant. They have no bearing on his liability or upon the extent of the plaintiffs' injury nor do they afford a measure of the plaintiffs' working capacity during their disability. The fact that such payments were made, and their amount, were rightly disregarded by the judge in estimating the plaintiffs' damages. That was in accord with the weight of authority in this country."

The case of *Gutzweiler v. Milwaukee Electric Railway & Light Company*, 136 Wis. 34, 116 N. W. 633, holds that the amount received by an injured person under an accident policy for which he has paid premiums cannot be considered by way of partial or total satisfaction of damages claimed by such injured person from the tort feasor.

To similar effect is the case of *Harding v. Town of Townshedn*, 43 Vt. 536. In this case, in answer to the contention of the tort feasor that the injured plaintiff was entitled to but one satisfaction for the injury he had sustained, the court in substance holds that to permit the tort feasor to take advantage of the insurance of the injured person would be a "privation of justice." It was held that the tort feasor was not entitled to have the proceeds of an accident insurance policy of the plaintiff deducted from the amount of damages.

To similar effect is the case of *Wells v. Minnesota Baseball and Athletic Association*, 122 Minn. 327, 142 N. W. 706, wherein it is held that a plaintiff may recover the reasonable value of nursing service rendered to her by her mother even gratuitously and without promise to pay.

If it be claimed by the plaintiff that it acquires some right by operation of law or by subrogation, then the answer is that such rights cannot be acquired in Califor-

nia and usually not elsewhere. See *Franklin v. Franklin*, 67 Cal. App. (2d) 717, 155 P. (2d) 637, and other cases heretofore cited earlier in this section of this brief.

Nor can an action for damages for personal injuries be settled and recovered partly at one time and partly at another. (*Kidd v. Hillman*, 14 Cal. App. (2d) 507, 58 P. (2d) 662.) This case, in some respects, is not unlike the case at bar. The plaintiff brought an action for damages to person and property resulting from an automobile accident caused by the defendant's negligence. In this action, she obtained a judgment and executed a release to the defendant of all liability. Subsequently, another action was brought for damages to her automobile upon the theory that the insurance company, having indemnified her for the damage to her machine, had become subrogated to her right of action and therefore should be permitted to recover for the damage to the automobile. It was held that the release signed by the plaintiff was binding on the insurance company; that the cause of action for damages arising out of the action could not be split, and that in this respect the insurer was in no better position than the insured. The action was barred both by the release and by the rule forbidding the splitting of the cause of action.

See, also, to similar effect:

Grain v. Aldrich, 38 Cal. 514, 519;

Van Horne v. Treadwell, 164 Cal. 620, 622; 130 Pac. 5;

Herritch v. Porter, 23 Cal. 385.

Not only is it the law of California that there is no right of recovery in an employer for such items of lost

wages and hospital expenses as those for which the plaintiff sues in the case at bar, but there are sundry decisions elsewhere to the same effect.

Interstate Telephone & Telegraph Co. v. Public Service Electric Co., 86 N. J. Law, 26, 90 Atl. 1068.

This case discusses generally the question as to whether an employer has any right to recover wages and medical bills paid to or for an employee. The Court says:

> "The legal right of an employer to recover damages for the loss of service of employees due to tortious act of a third person has never included the wages paid his servants for past work or the wages he might pay for future work. What the employer loses is the value of the services to him; what the present plaintiff seeks to recover is the value of the services to the employee. The employer loses what he might have made over and above the cost of the employee's services; he does not in any proper sense lose the necessary expense of securing that labor."

So, also, in the case at bar the item of wages which the plaintiff seeks to recover is the "value of the services to the employee," if he be presumed to be an employee for the sake of the argument.

City of Philadelphia v. Philadelphia Rapid Transit Company, 337 Pa. St. 1, 10 A. (2d) 434. In this case it appeared that certain firemen, employees of the plaintiff, had been injured by the negligence of the defendant. The firemen brought a separate suit against the defendant and recovered judgments aggregating $25,000. In these suits they made claim for loss of wages and the cost of medical care but offered no evidence thereof. The city, under

compulsion of Pennsylvania statutes, continued to pay full wages to the firemen during their disability and also all medical and hospital bills occasioned by the injuries, the total sum aggregating in excess of $6,000. The city then brought this suit to recover from the defendant the amount of such payments. It was held that the city could not recover. The court adverts to the rule which we have shown prevails in California to the effect that the right to recover lost wages and medical bills rests in the injured employees and might have been enforced in the employees' actions, and that the law does not admit of a splitting of a cause of action between the employees and the employer. The court says that the mere fact that the city had paid wages and medical and hospital bills to and for the injured employees was no bar to the recovery of these items by the injured men in their suits against the defendant, and then says:

> "Appellant contends that the relation between the city and the firemen was that of master and servant and at common law a master has a right of action for loss of services of his servant caused by the negligence of a third party and that the city's suit can be sustained on that theory. It is extremely doubtful whether such a right of action should be recognized under modern conditions. Chelsea Moving & Trucking Co., Inc. v. Ross Towboat Co., 280 Mass. 282; 182 N. E. 477. In any event, no attempt was made to establish the extent of the city's loss by reason of the incapacity of the firemen. Apparently the only loss sustained was the compensation and expenses paid. As pointed out, the right to recover these items is in the firemen themselves and the city's right is based on subrogation, which cannot be asserted in a separate suit."

Chelsea Moving & Trucking Co., Inc. v. Ross Towboat Co., 280 Mass. 282, 182 N. E. 477. In this case, referred to in the last cited case, it appeared that an employee of plaintiff was injured by the negligence of the defendant, resulting in such employee's disability and impairment of earning capacity, and that by contract the plaintiff was obligated to pay, and had in fact paid, to the injured employee, named Hoffman, his regular salary during such disability. In a former action Hoffman, the injured employee, had recovered from the defendant damages for his injuries, in which no claim was made and no recovery had for impairment of earning capacity or loss of wages. The plaintiff then brought this action against the defendant, claiming the right to recover the wages it had paid to the injured employee during his disability. It was held that the declaration stated no cause of action. The court draws a distinction between an action in tort founded on a relation springing from a contract and an action for tortious injury to a child brought by a parent whose loss is the effect of a relation which is both natural and legal and hence not too remote. The court also adverts to the rule which we have heretofore mentioned in this brief to the effect that the relation of master and apprentice was such as would sustain an action similar to that of a parent for injury to his child, and says (p. 285):

> "The status of apprentice included frequently, if not always, the equivalent of membership in the family of the master. In aspects of nurture and training and education either in a trade or in the schools the relationship bears resemblance to that of parent and child. The right of action in the *Imes* case is strongly akin to that long recognized by the law by the

parent for consequential damages from injury to his minor child, including loss of service during the nonage."

The court then states that the rule has been laid down in numerous cases that the plaintiff in an action for personal injuries founded on the negligence of a defendant is entitled to have taken into account as an element of damages the impairment of his capacity for labor and that loss of time and diminuation of earning power accrued and likely to accrue may be considered in estimating damages and that the injury of which the plaintiff complains (that is the loss of wages), is a part of the injury which Hoffman, the injured employee, sustained. It then points out that it is the general rule that all damages resulting from a specified cause of action must be assessed in one proceeding and that a single cause of action cannot be split and made the basis of several proceedings. The court says (p. 286):

"The weight of authority in other jurisdictions supports the conclusions and implications of our own decisions. * * * Some cases of action by a master to recover damages founded on contract with his servant injured by the tort of the defendant have a contrary tendency. Those cases chiefly arose many years ago when the law of master and servant was comparatively undeveloped."

The court then concludes (p. 287):

"We are unable to perceive any sound distinction in principle between liability of a tort feasor to another when the injured person was under contract with that other to perform personal service and when under contract to do or not to do some other act, all unknown to the doer of the wrong. In the latter

instances plainly there is no liability because the damage is too remote and indirect. It is not the natural and probable consequence of the ordinary tort. We think by the same reasoning that in the former instance there cannot rightly be held to be liability."

It was held in *Northern States Contracting Company v. Oakes,* 191 Minn. 88, 253 N. W. 371, that a contractor could not recover from a subcontractor for increased workmen's compensation insurance premiums which the contractor was compelled to pay in consequence of an employee's death caused by the subcontractor's negligence, as this was a too remote and indirect result of a wrongful act.

Closely akin to the foregoing cases and involving the same rule of law as is indicated in the quotation appearing above from the case of *Chelsea Moving & Trucking Co., Inc. v. Ross Towboat Co.,* 280 Mass. 282, 182 N. E. 477, is the general rule that a tort to one person does not make the tort feasor liable to another person merely because the injured person was under a contract with that other. In the instant case, therefore, if it should be thought that there was any contractual relation between the injured soldier and the government under which the latter was obliged to pay the injured soldier his compensation and medical expense, this fact would not give the plaintiff any cause of action against the defendant who had negligently injured the soldier. To this point we cite several cases of which the first is *Robins Dry Dock & Repair Co. v. Flint,* 275 U. S. 303, 72 L. Ed. 290.

In this case it seems that the respondents were charterers of a certain steamship. Under the terms of the charter, the ship was to be docked each six months and pay-

ment of the hire was to be suspended until it was again in proper state for service. In accordance with these terms, the ship was delivered to the petitioner for repairs, and by reason of the petitioner's negligence, the propeller of the ship was so injured that a delay was caused for which the suit was brought. It was held that the charterers could have no cause of action against the petitioner, the Supreme Court saying:

> "Of course the contract of the petitioner with the owners imposed no immediate obligation upon the petitioner to third persons as we already have said, and whether the petitioner performed it promptly or with negligent delay was the business of the owners and of nobody else. But as there was a tortious damage to a chattel it is sought to connect the claim of the respondents with that in some way. The damage was material to them only as it caused the delay in making the repairs, and that delay would be a wrong to no one except for the petitioner's contract with the owners. The injury to the propeller was no wrong to the respondents but only to those to whom it belonged. But suppose that the respondent's loss flowed directly from that source. Their loss arose only through their contract with the owners—and while intentionally to bring about a breach of contract may give rise to a cause of action Angle v. Chicago St. P. M. & O. R. Co., 151 U. S. 1, 38 L. Ed. 55, 14 S. Ct. Rep. 240, no authority need be cited to show that as a general rule, at least, a tort to the person or property of one man does not make the tort-feasor liable to another merely because the injured person was under a contract with that other, unknown to the doer of the wrong. See National Sav. Bank v. Ward, 100 U. S. 195, 25 L. Ed. 621. The law does not spread its protection so far."

The case of *The Federal No. 2*, 21 F. (2d) 313 (C. C. A. 2d), involved an attempt by one who was under contractual obligations to pay the hospital expenses of an injured employee to recover the amount of the expenses from a tort feasor who had injured an employee. The Circuit Court of Appeals says:

> "The appellant's claim, as alleged, is based upon the theory that the tug was a proximate cause in a chain of causation resulting in the damage. The seaman was cared for in the United States Marine Hospital, and because he was under contractual relations with the appellant as a seaman it was obliged to pay the bill. The basis of the claim is that the negligence resulting in injury to Parr gave rise to the occasion which required or obliged the appellant to pay the hospital bill. Even though one causes injury to another, to impose responsibility therefor contemplates a violation of a legal duty. The tug owed no legal duty to the appellant with reference to its contractual rights with the seaman. No principle of subrogation of rights is involved. The seaman had a cause of action against the tug for negligence. If he had succeeded in it or settled or made adjustment thereof, that would end all of appellant's claims resulting from injury to this seaman. In the absence of some right of subrogation, either by contract or foreign law, the appellant may not succeed. In the absence of some contractual rights, such as exist in the case of accident insurers to recover losses paid an assured, which the assured can recover from the tort-feasor and the insurer (Suttles v. Ry. Mail Assn., 156 App. Div. 435, 141 N. Y. S. 1024), we perceive no right of action accorded to the appellant.
>
> * * * When the seaman was injured, the contingency contemplated in is contract of employ-

ment occurred and he was entitled as promised by implication of law, to his employer's aid in effecting his cure; that is, the payment of the hospital bill and maintenance. It is too indirect to insist that this may be recovered, where there is neither the natural right nor legal relationship between the appellant and the tug, even though the alleged right of action be based upon negligence.

"* * * The cause of the responsibility is the contract; the tort is the remote occasion."

In *The Toluma*, 72 F. (2d) at page 693, the rule is thus stated:

"It may be accepted generally that a tort to one person does not extend in legal consequence to a third person who has been harmed merely because he had contracted with the one directly injured in person or properrty by the tort."

Similarly, in *Brink v. Wabash Railroad Company*, 160 Mo. 87, 60 S. W. 1058, it was held, as epitomized in the syllabus:

"The injury to a parent by the negligent killing of his son who is under contract to support him, thereby preventing performance of the contract, is too remote to form a basis for recovery on behalf of the parent in absence of wilful intent to injure the parent."

In the case of *Connecticut Mutual Life Insurance Company v. New York & New Haven Railroad Co.*, 25 Conn. 265, the Supreme Court of Connecticut has recognized the same rule thus succinctly stated in the syllabus:

"Where one person has contract relations with another, an injury to the latter which affects disastrous-

ly those relations, does not constitute a legal injury to the former."

The case of *Byrd v. English*, 117 Ga. 191, 43 S. E. 419, cites the *Connecticut* case above mentioned and reaches the same conclusion. We quote from the syllabus:

> "A party to a contract who is injured by reason of the failure of the other party to comply with its terms cannot recover damages for the negligent act of a third person by which the performance of the contract was rendered impossible."

Thus, it appears, both under California law and elsewhere that no right of action is afforded to a master to recover the wages lost by a servant and the hospital and medical expenses necessary for the treatment of the servant, even though those items may have been paid by the Master; furthermore, that the right of action for those items rests in the injured servant and does not rest in the master; and that the right of action which a master has for loss of service is not at all to be measured by the wages which have been lost by the employee. Such lost wages are the measure of one of the items of damage suffered by the injured person and are not a measure of the damage sustained by the master.

Upon page 73 of the Petitioner's brief are cited certain cases claimed to support the doctrine that where a master is under a duty to maintain the servant, expenditures for hospital and medical care required by the defendant's tort are considered a proper element of the master's damages. The cases are not authority for this statement. We proceed to examine them.

The first case of *Netherland-American Steam Nav. Co. v. Hollander*, 59 Fed. 417 involved the right of a parent to recover for injuries to his child. As we have pointed out, the right of a parent is different from that of a master and in California is governed by a separate statute. The case, however, is of considerable interest for a distinction is drawn between the recovery allowed to a master for injury to his servant and the recovery allowed to a parent for injury to his child. After adverting to the fact that by some authorities the loss of service is the foundation of an action by a parent and noting that English courts, influenced by this strict view of the gravamen of the action, have decided that a father has no remedy, even for his expenses, where a child is of such tender years as to be incapable of rendering any services, then draws a distinction between actions by a parent and actions by a master, saying:

> "The authorities in this country have approved a more liberal and more reasonable doctrine, and, basing the right of action upon parental relation, instead of that of master and servant, allow the father to recover consequential loss, irrespective of the age of the minor."

The next case of *Jones v. Waterman S. S. Corporation*, 155 F. (2d) 992, involved the relation of a shipowner and its seamen. The holding of the court seems to have been largely influenced by three things: first, the action arose in Pennsylvania and the opinion states that no Pennsylvania cases could be found upon the direct question—that is, the right of a master to recover from a third person the expenditures the master had made as a result of tortious injuries to the employee; second, that the ship-seaman relationship is different from that of master and

servant; and third, much influence seems to have been exerted by the opinion of the District Court in the case at bar. In this third aspect, the opinion, therefore, rests in part upon a decision which has been since reversed by the Circuit Court of Appeals and the doctrines of which are now under consideration in the instant case. Respecting the statement of the opinion that no Pennsylvania cases could be found upon the question, we refer to the rather recent Pennsylvania case of *City of Philadelphia v. Philadelphia Rapid Transit Company*, 337 Pa. St. 1, 10 A. (2d) 434, to which we have already adverted in this brief. There the Pennsylvania Supreme Court follows the rule which we have already shown prevails in California to the effect that the right to recover lost wages and medical bills rests in the injured employee and that the mere fact that the plaintiff city of Philadelphia had paid wages and hospital and medical bills under compulsion of the Pennsylvania statutes was no bar to the recovery of these items by the injured men in their suits against the defendant. The City had no cause of action for these sums thus expended. Apparently, the opinion of the Circuit Court of Appeals in the case of *Jones v. Waterman* would have been different if this Pennsylvania case had been before the court. In any event, in the *Jones* case there is a strong dissenting opinion suggesting that any recovery ought first to be preceded by passage of legislation by the Pennsylvania Legislature.

The next cases cited—that is, *Sawyer v. Sauer*, 10 Kan. 519, and *Franklin v. Butcher*, 144 Mo. Appeals, 660, are both parent and child cases and not cases involving the relationship of master and servant. The case of *Coon v. Moffitt*, 2 Pen. (N. J.) 583, also found in 3 N. J. Law 169, was an action by a mother for damages for the de-

bauching of her daugther and also falls among the cases allowing a parent to recover for medical expense incurred in treating a child. It is to be noted that this last mentioned action was decided in 1809. The more modern doctrine in New Jersey as respects suits by a master is laid down in *Interstate Telephone & Telegraph Company v. Public Service Electric Company*, 86 N. J. Law 26, 90 Atl. 1068. There the court says that the legal right of an employer to recover damages for the loss of services of employees due to the tortious act of a third person has never included the wages paid his servant for past work or the wages he might pay for future work. It points out that what the employer loses is what he might have made over and above the cost of the employee's services and he does not, in any proper sense, lose the necessary expense of securing that service.

The next succeeding case is *Callaghan v. Lake Hopatcong Ice Company*, 69 N. J. Law 100. That case also involves the parent and child relation and we have already pointed out that as to master and servant the rule as to recovery in New Jersey is different. (*Interstate Telephone & Telegraph Company v. Public Service Electric Company*, 86 N. J. Law 26, 90 Atl. 1068.)

Also cited is *Hodsoll v. Stallebrass*, 11 A. & E. 301, also found in 113 English Reports 492. This case was decided in 1840. It was an action by a master for damages claimed to have resulted from a servant having been bitten by defendant's dog. While it appears in the brief report of this case that the declaration contained some

language that the plaintiff had expended money in attempting to cure his servant, it does not appear that there was any evidence introduced of such expenditures nor any allowance therefor. The jury had allowed 10£ damages covering the time up to the filing of the declaration and 20£ damages covering the time thereafter. The sole and only point decided in the case was that the plaintiff could recover the 20£ allowed by the jury for damages for loss of services subsequent to the filing of the declaration.

Martinez v. Gerber, 3 M. & G. 89, also found at 113 English Common Pleas Reports 1069, was a case in which the plaintiff-master sued for loss of services of his injured servant and the expense of procuring another to do the injured servant's work. No claim of wages paid to the injured servant or of medical expense paid for him was involved.

The last case cited by petitioner on this point is *Attorney General v. Valle-Jones*, 2 K. B. 209, to which we have already adverted, showing not only that it stands alone but that the relationship of the soldier to the Crown was not at issue, the case having in effect gone by default on that question.

Petitioner argues, in effect, that the doctrine of the parent and child cases permitting recovery by the parent of the expenses of caring for the child who has been injured should be extended to the present case. This would be contrary to the law as it has long existed. Thus, in *Reeve on Domestic Relations* (4th Ed., 1888), 486, the learned author was considering the right of a

master to recover where his servant had been injured, and after indicating that there is a right of recovery of expenses of treatment in the case of slaves, apprentices, and children, says:

> "But in case of a hired servant, the servant must ultimately be at all the expense himself; and such expense will be a part of the damages which belong to him. If the beating be such as occasion no loss of services, the master is not entitled to recover anything."

Petitioner's argument also goes counter to the general trend of the authorities. Thus, in *Bartley v. Richtmyer*, 4 N. Y. (Comstock) 38, we have already pointed out that the opinion states that the courts went to the full length of their power when they held that the relation of parent and child might be regarded as that of master and servant for the purpose of supporting this class of action.

Petitioner's argument is also counter to the trend of the more modern authorities.

Interstate Telephone & Telegraph Company v. Public Service Electric Company, 86 N. J. Law 26, 90 Atl. 1068;

City of Philadelphia v. Philadelphia Rapid Transit Company, 337 Pa. State 1, 10 A. (2d) 434;

City of Youngstown v. City Service Oil Co., 66 Ohio Appeals 97, 31 N. E. (2d) 876;

Wood v. Ford Garage Company, 162 Misc. 87, 293 N. Y. S. 999, 1003; Affirmed 252 App. Div. 921, 300 N. Y. S. 1358.

Conclusion.

We earnestly contend in this case that the law applicable and by which it should be judged is the law of California. This contention, we think, is warranted by the federal statute which provides that

> "The laws of the several states, except where the constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."
>
> 1 Stat. at Large, 73, 92; Chap. 20;
> 28 U. S. C. A., Section 725.

This statute was authoritatively applied in accordance with its terms in *Erie v. Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188. See, also, *West v. American Telephone & Telegraph Company*, 311 U. S. 223, 61 S. Ct. 179, 85 L. Ed. 139.

If, however, the court should disagree with us, then we point out that there is no federal general common law.

> *Erie v. Tompkins*, 304 U. S. 64;
>
> *Kansas v. Colorado*, 205 U. S. 46;
>
> *Western Union Telegraph Company v. Call Publishing Company*, 181 U. S. 92.

If, therefore, in the absence of reliance upon California law the rule to be adopted in this case is to be "fashioned from the materials at hand," then those materials are

ready in the decisions of the courts of last resort of the states and in the decisions of the federal courts which we have cited, which are almost unanimous in compelling the conclusion that there is no right of recovery in a case such as this unless the relation of master and servant exists and that, even if there were a right of recovery for loss of service, yet no such right exists for the recovery of the items of lost wages of the injured man and medical expense and hospitalization, which items constitute elements of the injured person's measure of damages and not elements of the master's right of recovery.

Where else should we search to find the guiding principle other than in the decisions of the courts? Pertinent to this thought is the language of this court in *Kansas v. Colorado*, 205 U. S. 46, 96, when, after quoting Kent's Declaration that "The common law includes those principles, useages, and rules of action applicable to the government and security of persons and property, which do not rest for their authority upon any express and positive declaration of the will of the legislature," proceeds as follows:

> "As it does not rest on any statute or other written declaration of the sovereign, there must, as to each principle thereof, be a first statement. Those statements are found in the decisions of courts, and the first statement presents the principle as certainly as the last. Multiplication of declarations merely adds certainty. For after all, the common law is but the accumulated expressions of the various judicial trib-

unals in their efforts to ascertain what is right and just between individuals in respect to private disputes."

We suggest that it would not be "right and just" if one rule of law be applied to the injured man in this case permitting him to recover for his lost wages and necessary hospital expenses, whether paid by him or not (and such is the law of California, as we have shown) and another rule of law to apply to the plaintiff under which it would also have a right of recovery for the same items.

In conclusion, therefore, we urge that it has been shown that the relation of master and servant does not exist between the plaintiff and its injured soldier, that in the absence of such relation, no right of action would arise for recovery of loss of services and that at all events no cause of action exists in the plaintiff either under California law or generally elsewhere for the recovery of the items sued for in this case.

We respectfully urge that the decision of the Circuit Court of Appeals was correct and should be affirmed.

Respectfully submitted,

JENNINGS & BELCHER,

By FRANK B. BELCHER,

Attorneys for Standard Oil Company of California and Ira Boone.

SUPREME COURT OF THE UNITED STATES

No. 235.—October Term, 1946.

The United States of America, Petitioner, *v.* Standard Oil Company of California and Ira Boone.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[June 23, 1947.]

Mr. Justice Rutledge delivered the opinion of the Court.

Not often, since the decision in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, is this Court asked to create a new substantive legal liability without legislative aid and as at the common law. This case of first impression here seeks such a result. It arises from the following circumstances.

Early one morning in February, 1944, John Etzel, a soldier, was hit and injured by a truck of the Standard Oil Company of California at a street intersection in Los Angeles. The vehicle was driven by Boone, an employee of the company. At the Government's expense of $123.45 Etzel was hospitalized, and his soldier's pay of $69.31 was continued during his disability. Upon the payment of $300 Etzel released the company and Boone "from any and all claims which I now have or may hereafter have on account of or arising out of" the accident.[1]

From these facts the novel question springs whether the Government is entitled to recover from the respondents as tort-feasors the amounts expended for hospitalization and soldier's pay, as for loss of Etzel's services. A jury being waived, the District Court made findings of

[1] The instrument of release recited that the payment "is not, and is not to be construed as" an admission of liability.

fact and conclusions of law in the Government's favor upon all the issues, including those of negligence and contributory negligence. Judgment was rendered accordingly.[1] 60 F. Supp. 807. This the Circuit Court of Appeals reversed, 153 F. 2d 958, and we granted certiorari because of the novelty and importance of the principal question.[2] 329 U. S. 696.

As the case reaches us, a number of issues contested in the District Court and the Circuit Court of Appeals have been eliminated.[3] Remaining is the basic question of respondents' liability for interference with the government-soldier relation and consequent loss to the United States,

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[1] The Government's petition for certiorari asserted that "upwards of 450 instances of negligently inflicted injuries upon soldiers of the United States, requiring hospitalization at Government expense, and the payment of compensation during incapacitation, have been reported by the War Department to the Department of Justice in the past three years," and that additional instances were being reported to the War Department at the rate of approximately 40 a month.

The suit also was said to be representative of a number already commenced, *e. g.*, *United States* v. *Atlantic Coast Line R. Co.*, 64 F. Supp. 289 (E. D. N. C.), dismissed on the ground that no master-servant relationship existed, and *United States* v. *Klein*, 153 F. 2d 55 (C. C. A. 8), an action to recover hospital and medical expenses incurred as a result of an injury to a Civilian Conservation Corps employee, dismissed for the reason that the United States Employees' Compensation Act, 5 U. S. C. § 751 *et seq.*, was held to afford the Government a method of recoupment, concededly not available here.

[2] Including the issues of negligence and contributory negligence, as to which a stipulation of record on the appeal to the Circuit Court of Appeals states that evidence other than that set forth in the stipulation is omitted "for the reason that appellants are not making any point on appeal as to the insufficiency of the evidence either to prove negligence or the absence of contributory negligence."

Although the District Court refused to find that Etzel as a soldier was "as such, a servant of the plaintiff," respondents designated as the points on appeal on which they intended to rely: That the United States had no cause of action or right to recover for the compensation

together with questions whether this issue is to be determined by federal or state law[4] and concerning the effect of the release.[5] In the view we take of the case it is not necessary to consider the questions relating to the

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paid Etzel or for the medical and hospital expenditures; that he "was not an employee of the plaintiff nor was plaintiff his master nor did the relation of employer or employee exist between them"; and that his release was effective to end "all right to recover for lost wages or medical or hospital expenses."

[4] The Circuit Court of Appeals, considering that at the outset it was "confronted with the problem of what law should apply," said: "Aside from any federal legislation conferring a right of subrogation or indemnification upon the United States, it would seem that the state rules of substantive common law would govern an action brought by the United States in the role of private litigant. *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 71, 78; *United States* v. *Moscow-Idaho Seed Co.*, *supra* [92 F. 2d 170], at pages 173, 174." 153 F. 2d at 960. The court then indicated agreement with appellant that California's statutory law, namely, § 49 of the Civil Code, was controlling and concluded that the Government's case "must fail for two reasons: first, because the government-soldier relation is not within § 49 of the Code, and, second, because the government is not a 'master' and the soldier is not a 'servant' within the meaning of the Code section." 153 F. 2d at 961.

The court further concluded, however, that Etzel's release "covered his lost wages and medical expenses as elements of damage," and therefore was effective to discharge all liability, including any right of subrogation in the United States "without statutory authority." Finally the opinion stated: ". . . it seems clear that Congress did not intend that for tortious injuries to a soldier in time of war, the government should be subrogated to the soldier's claims for damages." *Id.* at 963.

[5] See note 3. The Government's claim, of course, is not one for subrogation. It is rather for an independent liability owing directly to itself as for deprivation of the soldier's services and "indemnity" for losses caused in discharging its duty to care for him consequent upon the injuries inflicted by appellants. See *Robert Mary's Case*, 9 Co. at 113a. It is, in effect, for tortious interference by a third person with the relation between the Government and the soldier and consequent harm to the Government's interest, rights and obligations in that relation, not simply to subrogation to the soldier's rights against the tort-feasors.

release,[6] for we have reached the conclusion that respondents are not liable for the injuries inflicted upon the Government.

We agree with the Government's view that the creation or negation of such a liability is not a matter to be determined by state law. The case in this aspect is governed by the rule of *Clearfield Trust Co.* v. *United States*, 318 U. S. 363, and *National Metropolitan Bank* v. *United States*, 323 U. S. 454, rather than that of *Erie R. Co.* v. *Tompkins*, *supra*. In the *Clearfield* case, involving liabilities arising out of a forged indorsement of a check issued by the United States, the Court said: "The authority to issue the check had its origin in the Constitution and the statutes of the United States and was in no way dependent on the laws of Pennsylvania or of any other state. Cf. *Board of Commissioners* v. *United States*, 308 U. S. 343; *Royalty Indemnity Co.* v. *United States*, 313 U. S. 289. The duties imposed upon the United States and the rights acquired by it as a result of the issuance find their roots in the same federal sources. Cf. *Deitrick* v. *Greaney*, 309 U. S. 190; *D'Oench, Duhme & Co.* v. *Federal Deposit Ins. Corp.*, 315 U. S. 447. In the absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards." 318 U. S. at 366–367.

Although the *Clearfield* case applied these principles to a situation involving contractual relations of the Government, they are equally applicable in the facts of this case where the relations affected are noncontractual or tortious in character.

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[6] We may assume that the release was not effective to discharge any liability owing independently to the Government, cf. note 5, although fully effective as against any claim by the soldier. Only if such an independent liability were found to exist would any issue concerning the release be reached.

Perhaps no relation between the Government and a citizen is more distinctively federal in character than that between it and members of its armed forces. To whatever extent state law may apply to govern the relations between soldiers or others in the armed forces and persons outside them or nonfederal governmental agencies, the scope, nature, legal incidents and consequences of the relation between persons in service and the Government are fundamentally derived from federal sources and governed by federal authority. See *Tarble's Case*, 13 Wall. 397; *Kurtz* v. *Moffitt*, 115 U. S. 487. So also we think are interferences with that relationship such as the facts of this case involve. For, as the Federal Government has the exclusive power to establish and define the relationship by virtue of its military and other powers,[7] equally clearly it has power in execution of the same functions to protect the relation once formed from harms inflicted by others.[8]

Since also the Government's purse is affected, as well as its power to protect the relationship, its fiscal powers, to the extent that they are available to protect it against financial injury, add their weight to the military basis for excluding state intrusion. Indeed, in this aspect the case is not greatly different from the *Clearfield* case or from one involving the Government's paramount power of control over its own property, both to prevent its un-

[7] Including the powers of Congress to "provide for the common Defense," "raise and support Armies," and "make Rules for the Government and Regulation of the land and naval Forces," U. S. Const., Art. I, § 8, as well as "To declare War" and "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing powers. . . ." *Ibid.*

[8] The decision of the Circuit Court of Appeals seems to have been predicated upon the assumption that Congress could override any contrary rule of state law and that the California law governs only in the absence of Congress' affirmative action. See note 4 *supra*.

authorized use or destruction and to secure indemnity for those injuries.[9]

As in the *Clearfield* case, moreover, quite apart from any positive action by Congress, the matter in issue is neither primarily one of state interest nor exclusively for determination by state law within the spirit and purpose of the *Erie* decision. The great object of the *Erie* case was to secure in the federal courts, in diversity cases, the application of the same substantive law as would control if the suit were brought in the courts of the state where the federal court sits. It was the so-called "federal common law" utilized as a substitute for state power, to create and enforce legal relationships in the area set apart in our scheme for state rather than for federal control, that the *Erie* decision threw out. Its object and effect were thus to bring federal judicial power under subjection to state authority in matters essentially of local interest and state control.

Conversely there was no purpose or effect for broadening state power over matters essentially of federal character or for determining whether issues are of that nature. The diversity jurisdiction had not created special problems of that sort. Accordingly the *Erie* decision, which related only to the law to be applied in exercise of that jurisdiction, had no effect, and was intended to have none, to bring within the governance of state law matters exclusively federal, because made so by constitutional or valid congressional command, or others so vitally affecting interests, powers and relations of the Federal Government

[9] See U. S. Const., Art. IV, § 3, cl. 2: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . ."; *Camfield* v. *United States*, 167 U. S. 518, 524: ". . . the government has, with respect to its own lands, the rights of an ordinary proprietor, to maintain its possession and to prosecute trespassers."; *United States* v. *Walter*, 263 U. S. 15, 17: "The United States can protect its property by criminal laws. . . ."

as to require uniform national disposition rather than diversified state rulings. Cf. *Clearfield Trust Co.* v. *United States*, 318 U. S. at 366–368. Hence, although federal judicial power to deal with common-law problems was cut down in the realm of liability or its absence governable by state law, that power remained unimpaired for dealing independently, wherever necessary or appropriate, with essentially federal matters, even though Congress has not acted affirmatively about the specific question.

In this sense therefore there remains what may be termed, for want of a better label, an area of "federal common law" or perhaps more accurately "law of independent federal judicial decision," outside the constitutional realm, untouched by the *Erie* decision. As the Government points out, this has been demonstrated broadly not only by the *Clearfield* and *National Metropolitan Bank* cases, but also by other decisions rendered here since the *Erie* case went down,[10] whether or not the Government is also correct in saying the fact was foreshadowed the same day by *Hinderlider* v. *La Plata Co.*, 304 U. S. 92, 110, in a unanimous opinion delivered likewise by Mr. Justice Brandeis.[11]

It is true, of course, that in many situations, and apart from any supposed influence of the *Erie* decision, rights, interests and legal relations of the United States are determined by application of state law, where Congress has

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[10] *Board of Commissioners* v. *United States*, 308 U. S. 343; *Deitrick* v. *Greaney*, 309 U. S. 190; *Royal Indemnity Co.* v. *United States*, 313 U. S. 289; *D'Oench Duhme & Co.* v. *Federal Deposit Ins Corp.*, 315 U. S. 447; *United States* v. *Allegheny County*, 322 U. S. 174; *Holmberg* v. *Armbrecht*, 327 U. S. 392. See also discussion in Notes, *Federal Common Law in Government Action for Tort* (1946) 41 Ill. L. Rev. 551; *Exceptions to Erie* v. *Tompkins: The Survival of Federal Common Law* (1946) 59 Harv. L. Rev. 966.

[11] If the ruling followed, that the waters of an interstate stream must be equitably apportioned among the states through which it flows in the arid regions of the West, is not properly to be character-

not acted specifically. "In our choice of the applicable federal rule we have occasionally selected state law." *Clearfield Trust Co.* v. *United States*, 318 U. S. at 367. The Government, for instance, may place itself in a position where its rights necessarily are determinable by state law, as when it purchases real estate from one whose title is invalid by that law in relation to another's claim. Cf. *United States* v. *Fox*, 94 U. S. 315.[12] In other situations it may fairly be taken that Congress has consented to application of state law, when acting partially in relation to federal interests and functions through failure to make other provision concerning matters ordinarily so governed.[13] And in still others state law may furnish convenient solutions in no way inconsistent with adequate protection of the federal interest.

But we do not undertake to delimit or categorize the instances where it is properly to be applied outside the *Erie* aegis. It is enough for present purposes to point out that they exist, cover a variety of situations, and generally involve matters in which application of local law not only affords a convenient and fair mode of disposition, but also is either inescapable, as in the illustration given above, or does not result in substantially diversified treatment where uniformity is indicated as more appropriate, in view of the nature of the subject matter and the specific issues affecting the Government's interest.

Whether or not, therefore, state law is to control in such a case as this is not at all a matter to be decided by

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ized as merely one of "federal common law," it marks off at any rate another area for federal judicial decision not dependent on application of state law or, indeed, upon the existence of federal legislation.

[12] The problem of the Government's immunity to suit is different, of course, from that of the nature of the substantive rights it may acquire, for example, by the purchase of property as against claims of others for which there may or may not be available a legal remedy against it.

[13] See *Blair* v. *Commissioner*, 300 U. S. 5; *Reconstruction Finance Corp.* v. *Beaver County*, 328 U. S. 204.

application of the *Erie* rule. For, except where the Government has simply substituted itself for others as successor to rights governed by state law, the question is one of federal policy, affecting not merely the federal judicial establishment and the groundings of its action, but also the Government's legal interests and relations, a factor not controlling in the types of cases producing and governed by the *Erie* ruling. And the answer to be given necessarily is dependent upon a variety of considerations always relevant to the nature of the specific governmental interests and to the effects upon them of applying state law. These include not only considerations of federal supremacy in the performance of federal functions, but of the need for uniformity and, in some instances, inferences properly to be drawn from the fact that Congress, though cognizant of the particular problem, has taken no action to change long-settled ways of handling it.

Leaving out of account, therefore, any supposed effect of the *Erie* decision, we nevertheless are of opinion that state law should not be selected as the federal rule for governing the matter in issue. Not only is the government-soldier relation distinctively and exclusively a creation of federal law, but we know of no good reason why the Government's right to be indemnified in these circumstances, or the lack of such a right, should vary in accordance with the different rulings of the several states, simply because the soldier marches or today perhaps as often flies across state lines.

Furthermore, the liability sought is not essential or even relevant to protection of the state's citizens against tortious harms, nor indeed for the soldier's personal indemnity or security, except in the remotest sense,[14] since his

[14] That is, if potential added liability ever can be considered as having effect to deter the commission of negligent torts, the imposition of liability to indemnify the Government in addition to indemnifying the soldier conceivably could be thought to furnish some additional incentive for avoiding such harms.

personal rights against the wrongdoer may be fully protected without reference to any indemnity for the Government's loss.[15] It is rather a liability the principal, if not the only, effect of which would be to make whole the federal treasury for financial losses sustained, flowing from the injuries inflicted and the Government's obligations to the soldier. The question, therefore, is chiefly one of federal fiscal policy, not of special or peculiar concern to the states or their citizens. And because those matters ordinarily are appropriate for uniform national treatment rather than diversified local disposition, as well where Congress has not acted affirmatively as where it has, they are more fittingly determinable by independent federal judicial decision than by reference to varying state policies.

We turn, finally, to consideration of the policy properly to be applied concerning the wrongdoer, whether of liability or of continued immunity as in the past. Here the Government puts forward interesting views to support its claim of responsibility. It appeals first to the great principle that the law can never be wholly static. Growth, it urges, is the life of the law as it is of all living things. And in this expansive and creative living process, we are further reminded, the judicial institution has had and must continue to have a large and pliant, if also a restrained and steady, hand. Moreover, the special problem here has roots in the ancient soil of tort law, wherein the chief plowman has been the judge, notwithstanding his furrow may be covered up or widened by legislation.

Bringing the argument down to special point, counsel has favored us with scholarly discussion of the origins and foundations of liabilities considered analogous and of their later expansion to include relations not originally comprehended. These embrace particularly the liabilities created by the common law, arising from tortious in-

[15] See note 5 *supra*.

juries inflicted upon persons standing in various special legal relationships, and causing harm not only to the injured person but also, as for loss of services and assimilated injuries, to the person to whom he is bound by the relation's tie. Such, for obvious examples, are the master's rights of recovery for loss of the services of his servant or apprentice;[16] the husband's similar action for interference with the marital relation, including loss of consortium as well as the wife's services; and the parent's right to indemnity for loss of a child's services, including his action for a daughter's seduction.[17]

Starting with these long-established instances, illustrating the creative powers and functions of courts, the argument leads on in an effort to show that the government-soldier relation is, if not identical, still strongly analogous;[18] that the analogies are not destroyed by any of the variations, some highly anomalous,[19] characterizing

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[16] As to the ancient action for loss of services, existent in Bracton's day, see Wigmore, Interference With Social Relations (1887) 21 Amer. L. Rev. 764; VIII Holdsworth, A History of English Law (2d ed., 1937) 427–430; II *Id.*, 459–464; IV *Id.*, 379–387; Pollock, The Law of Torts (13th ed.) 234–239; Clerk & Lindsell on Torts (8th ed.) 201–212.

[17] Extension of the action *per quod servitium amisit* to domestic relations, upon a fictional basis, took place as early as 1653. *Norton* v. *Jason*, Style 398; see Winfield, Textbook of the Law of Tort (2d ed.) 257.

[18] Analogies are drawn concerning the nature of the relation both on the basis of status, underlying the earlier forms of liability, and on that of its asserted contractual character, in the latter instance to the rather far-fetched extent of regarding the drafted soldier as having entered into a "contract implied in law."

[19] *E. g.*, in the fiction of loss of services involved in the father's action for a daughter's seduction and in the husband's action for loss of consortium. Compare Serjeant Manning's oft-quoted statement that "the *quasi* fiction of *servitium amisit* affords protection to the rich man whose daughter occasionally makes his tea, but leaves without redress the poor man whose child is sent unprotected to earn her bread amongst strangers." Note to *Grinnell* v. *Wells*, 7 Man. & Gr. at p. 1044.

one or more of the settled types of liability; and that an exertion of creative judicial power to bring the government-soldier relation under the same legal protection against tortious interferences by strangers would be only a further and a proper exemplification of the law's capacity to catch up with the times. Further elaboration of the argument's details would be interesting, for the law has no more attractive scene of action than in the broad field compendiously labeled the law of torts, and within it perhaps none more engrossing than those areas dealing with these essentially human and highly personal relations.

But we forego the tendered opportunity. For we think the argument ignores factors of controlling importance distinguishing the present problem from those with which the Government seeks to bring it into companionate disposition. These are centered in the very fact that it is the Government's interests and relations that are involved, rather than the highly personal relations out of which the assertedly comparable liabilities arose; and in the narrower scope, as compared with that allowed courts of general common-law jurisdiction, for the action of federal courts in such matters.

We would not deny the Government's basic premise of the law's capacity for growth, or that it must include the creative work of judges. Soon all law would become antiquated strait jacket and then dead letter, if that power were lacking. And the judicial hand would stiffen in mortmain if it had no part in the work of creation. But in the federal scheme our part in that work, and the part of the other federal courts, outside the constitutional area is more modest than that of state courts, particularly in the freedom to create new common-law liabilities, as *Erie R. Co.* v. *Tompkins* itself witnesses. See also *United States* v. *Hudson*, 7 Cranch 32.

Moreover, as the Government recognizes for one phase of the argument but ignores for the other,[20] we have not here simply a question of creating a new liability in the nature of a tort.[21] For grounded though the argument is in analogies drawn from that field, the issue comes down in final consequence to a question of federal fiscal policy, coupled with considerations concerning the need for and the appropriateness of means to be used in executing the policy sought to be established. The tort law analogy is brought forth, indeed, not to secure a new step forward in expanding the recognized area for applying settled principles of that law as such, or for creating new ones. It is advanced rather as the instrument for determining and establishing the federal fiscal and regulatory policies which the Government's executive arm thinks should prevail in a situation not coveted by traditionally established liabilities.

Whatever the merits of the policy, its conversion into law is a proper subject for congressional action, not for any creative power of ours. Congress, not this Court or the other federal courts, is the custodian of the national purse. By the same token it is the primary and most often the exclusive arbiter of federal fiscal affairs. And these comprehend, as we have said, securing the treasury or the

[20] That is, in the phase stressing that the question is not to be determined by applying state law, the emphasis is put upon the federal aspect of the case, but in that advancing the thesis of liability for acceptance as the federal rule, stress goes to the tort grounding of the argument.

[21] The Government does not contend that the liability sought has existed heretofore. It frankly urges the creation of a new one. The only decision determining the matter, which has come to our attention, in addition to the cases cited above in note 2, is that of the High Court of Australia in *Commonwealth* v. *Quince*, 68 Com. L. Rep. 227, aff'g, (1943) Q. S. R. 199, denying liability. See also *Attorney General* v. *Valle-Jones* [1935] 2 K. B. 209, reaching a contrary result, in which however the principal issue apparently went by concession.

government against financial losses however inflicted, including requiring reimbursement for injuries creating them, as well as filling the treasury itself.

Moreover Congress without doubt has been conscious throughout most of its history that the Government constantly sustains losses through the tortious or even criminal conduct of persons interfering with federal funds, property and relationships. We cannot assume that it has been ignorant that losses long have arisen from injuries inflicted on soldiers such as occurred here. The case therefore is not one in which, as the Government argues, all that is involved is application of "a well-settled concept of legal liability to a new situation, where that new situation is in every respect similar to the old situation that originally gave rise to the concept. . . ." Among others, one trouble with this is that the situation is not new, at any rate not so new that Congress can be presumed not to have known of it or to have acted in the light of that knowledge.

When Congress has thought it necessary to take steps to prevent interference with federal funds, property or relations, it has taken positive action to that end.[22] We think it would have done so here, if that had been its desire. This it still may do, if or when it so wishes.

In view of these considerations, exercise of judicial power to establish the new liability not only would be in-

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[22] See, *e. g.*, 35 Stat. 1097, 18 U. S. C. § 94 (enticing desertion from the military or naval service); 35 Stat. 1097, 18 U. S. C. § 95 (enticing workmen from arsenals or armories); 35 Stat. 1097, 18 U. S. C. § 99 (robbery of personal property belonging to the United States); 35 Stat. 1097, 18 U. S. C. § 100 (embezzlement of property belonging to the United States).

Of course it has not been necessary for Congress to pass statutes imposing civil liability in those situations where it has been understood since the days of the common law that the sovereign is protected from tortious interference. Thus, trespass on land belonging to the United States is a civil wrong to be remedied in the courts. *Cotton* v. *United States*, 11 How. 228.

truding within a field properly within Congress' control and as to a matter concerning which it has seen fit to take no action. To accept the challenge, making the liability effective in this case, also would involve a possible element of surprise, in view of the settled contrary practice, which action by Congress would avoid,[23] not only here but in the many other cases we are told may be governed by the decision.

Finally, if the common-law precedents relied on were more pertinent than they are to the total problem, particularly in view of its federal and especially its fiscal aspects, in none of the situations to which they apply was the question of liability or no liability within the power of one of the parties to the litigation to determine. In them the courts stood as arbiters between citizens, neither of whom could determine the outcome or the policy properly to be followed. Here the United States is the party plaintiff to the suit. And the United States has power at any time to create the liability. The only question is which organ of the Government is to make the determination that liability exists. That decision, for the reasons we have stated, is in this instance for the Congress, not for the courts. Until it acts to establish the liability, this Court and others should withhold creative touch.

The judgment is

Affirmed.

MR. JUSTICE FRANKFURTER concurs in the result.

[23] Necessarily such an element or effect often, if not always, exists whenever a new liability is created, as at common law, in the nature of responsibility for tort. This, however, could not be made an invariably controlling consideration in cases presenting common-law issues concerning such liabilities to tribunals whose business it is primarily to decide them, for to do this would forestall all growth in the law except by legislative action. The factor, however, is one generally to be taken into account and weighed against the social need dictating the new responsibility, in cases squarely presenting those issues and not complicated, as this case is, by considerations arising from distributions of power in the federal system.

SUPREME COURT OF THE UNITED STATES

No. 235.—October Term, 1946.

The United States of America, Petitioner, v. Standard Oil Company of California and Ira Boone.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[June 23, 1947.]

Mr. Justice Jackson, dissenting.

If the defendant in this case had been held liable for negligently inflicting personal injuries on a civilian, it would have been obliged to pay, among other items of damage, the reasonable cost of resulting care by his doctor, hospital and nurse, and the earnings lost during the period of disability. If the civilian bore this cost himself, it would be part of his own damage; if the civilian were a wife and the expense fell upon her husband, he would be entitled to recover it; if the civilian were a child, it would be recoverable by the parent. The long-established law is that a wrongdoer who commits a tort against a civilian must make good to somebody these elements of the costs resulting from his wrongdoing.

What the Court now holds is that if the victim of negligence is a soldier, the wrongdoer does not have to make good these items of expense to the one who bears them. The United States is under the duty to furnish medical services, hospitalization and nursing to a soldier and loses his services while his pay goes on. These costs, which essentially fall upon the United States by reason of the sovereign-soldier relationship, the Court holds cannot be recovered by the United States from the wrongdoer as the parent can in the case of a child or the husband can in the case of a wife. As a matter of justice, I see no

reason why taxpayers of the United States should relieve a wrongdoer of part of his normal liability for personal injury when the victim of negligence happens to be a soldier. And I cannot see why the principles of tort law that allow a husband or parent to recover do not logically sustain the right of the United States to recover in this case.

But the Court has qualms about applying these well-known principles of tort law to this novel state of facts, unless directed to do so by Congress. The law of torts has been developed almost exclusively by the judiciary in England and this country by common law methods. With few exceptions, tort liability does not depend upon legislation. If there is one function which I should think we would feel free to exercise under a Constitution which vests in us judicial power, it would be to apply well-established common law principles to a case whose only novelty is in facts. The courts of England, whose scruples against legislating are at least as sensitive as ours normally are, have not hesitated to say that His Majesty's Treasury may recover outlay to cure a British soldier from injury by a negligent wrongdoer and the wages he was meanwhile paid. *Attorney General* v. *Valle-Jones* [1935] 2 K. B. 209. I think we could hold as much without being suspected of trying to usurp legislative function.